



ROYAL COMMISSION ON Marriage and Divorce

REPORT 1951-1955

*Presented to Parliament by Command of Her Majesty
March 1956*

LONDON
HER MAJESTY'S STATIONERY OFFICE
1956

PRICE 11s 6d NET

Cmd. 9678

SHEPHERD, COLL
/GRF



22500677112



ROYAL COMMISSION ON Marriage and Divorce

REPORT 1951-1955

*Presented to Parliament by Command of Her Majesty
March 1956*

LONDON
HER MAJESTY'S STATIONERY OFFICE
1956

PRICE 11s 6d NET

Cmd. 9678

SHEPHERD COLLECTION

/ARE



NOTE

The estimated gross total expenditure of the Commission is £35,463 4s. 6d.

Of this sum £1,647 12s. represents the estimated cost of printing and publishing this Report, and £3,710 the estimated cost of printing and publishing the Minutes of Evidence.

The sum of £649 has been recovered by the sale of Minutes of Evidence taken before the Commission.

ROYAL WARRANTS

GEORGE R.

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas KING, Defender of the Faith, to

Our Right Trusty and Well-beloved Counsellor Fergus Dunlop, Baron Morton of Henryton, upon whom has been conferred the decoration of the Military Cross, a Lord of Appeal in Ordinary ;

Our Right Trusty and Well-beloved Cousin Louise Rosemary Kathleen Virginia, Viscountess Portal, Member of Our Most Excellent Order of the British Empire ;

Our Trusty and Well-beloved :—

James Keith, Esquire (commonly called the Honourable Lord Keith), one of the Senators of Our College of Justice in Scotland ;

Sir Edward Holroyd Pearce, Knight, one of the Justices of Our High Court of Justice, Probate, Divorce and Admiralty Division ;

Sir Frederick John Burrows, Knight Grand Commander of Our Most Exalted Order of the Star of India, Knight Grand Commander of Our Most Eminent Order of the Indian Empire ;

Lady (Alice Grace Jenny) Bragg ;

Henry Lael Oswald Flecker, Esquire, Commander of Our Most Excellent Order of the British Empire, Master of Arts ;

Violet Mary Craig Robertson, Commander of Our Most Excellent Order of the British Empire, Doctor of Laws ;

Kate Winifred Jones-Roberts, Officer of Our Most Excellent Order of the British Empire ;

Thomas Young, Esquire, Officer of Our Most Excellent Order of the British Empire ;

May Tennent Baird, Bachelor of Science, Bachelor of Medicine, Bachelor of Surgery ;

Robert Beloe, Esquire, Master of Arts ;

Ethel Maud Brace ;

George Clark Phillips Brown, Esquire, Master of Arts ;

Frederick Geoffrey Lawrence, Esquire, one of Our Counsel learned in the Law ;

Darrell Mace, Esquire ;

Mabel Ridealgh ; and

James Walker, Esquire, one of Our Counsel learned in the Law, Master of Arts :

Greeting !

Whereas We have deemed it expedient that a Commission should forthwith issue to inquire into the law of England and the law of Scotland concerning divorce and other matrimonial causes and into the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife, and to consider whether any changes should be made in the law or its administration, including the law relating to the property rights of husband and wife, both during marriage and after its termination (except by death), having in mind the need to promote and maintain healthy and happy

married life and to safeguard the interests and well-being of children ; and to consider whether any alteration should be made in the law prohibiting marriage with certain relations by kindred or affinity :

Now know ye that We, reposing great trust and confidence in your knowledge and ability, have authorized and appointed, and do by these Presents authorize and appoint you the said Fergus Dunlop, Baron Morton of Henryton ; Louise Rosemary Kathleen Virginia, Viscountess Portal ; James Keith ; Sir Edward Holroyd Pearce ; Sir Frederick John Burrows ; Lady (Alice Grace Jenny) Bragg ; Henry Lael Oswald Flecker ; Violet Mary Craig Robertson ; Kate Winifred Jones-Roberts ; Thomas Young ; May Tennent Baird ; Robert Beloe ; Ethel Maud Brace ; George Clark Phillips Brown ; Frederick Geoffrey Lawrence ; Darrell Mace ; Mabel Ridealgh and James Walker to be Our Commissioners for the purposes of the said inquiry :

And for the better effecting the purposes of this Our Commission, We do by these Presents give and grant unto you, or any five or more of you, full power to call before you such persons as you shall judge likely to afford you any information upon the subject of this Our Commission ; to call for information in writing ; and also to call for, have access to and examine all such books, documents, registers and records as may afford you the fullest information on the subject and to inquire of and concerning the premises by all other lawful ways and means whatsoever :

And We do by these Presents authorize and empower you, or any of you, to visit and personally inspect such places as you may deem it expedient so to inspect for the more effectual carrying out of the purposes aforesaid :

And We do by these Presents will and ordain that this Our Commission shall continue in full force and virtue, and that you, Our said Commissioners, or any five or more of you may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment :

And We do further ordain that you, or any five or more of you, have liberty to report your proceedings under this Our Commission from time to time if you shall judge it expedient so to do :

And Our further will and pleasure is that you do, with as little delay as possible, report to Us your opinion upon the matters herein submitted for your consideration.

Given at Our Court at Saint James's the Eighth day of September, 1951 ; in the Fifteenth Year of Our Reign.

By His Majesty's Command.

Sgd. *J. Chuter Ede.*

ELIZABETH R. }
MARGARET } On behalf of His Majesty.

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas KING, Defender of the Faith, to Our Trusty and Well-beloved Margaret Allen,

Greeting !

Know ye that We reposing great trust and confidence in your knowledge and ability do by these Presents appoint you the said Margaret Allen to

be a Member of the Royal Commission on Marriage and Divorce, in the room of Our Trusty and Well-beloved Mabel Ridealgh, who has resigned.

Given at Our Court at Saint James's the Eighth day of October, 1951 ; In the Fifteenth Year of Our Reign.

By His Majesty's Command.

Sgd. *J. Chuter Ede.*

MRS. MARGARET ALLEN.

To be a Member of the Royal Commission
on Marriage and Divorce.

*ELIZABETH R.
MARGARET*

GEORGE THE SIXTH, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas KING, Defender of the Faith, to Our Trusty and Well-beloved Sir Charles Wilfrid Bennett, Baronet, upon whom has been conferred the Territorial Decoration, Lieutenant-Colonel in Our Army (retired),

Greeting!

Know ye that We reposing great trust and confidence in your knowledge and ability do by these Presents appoint you the said Sir Charles Wilfrid Bennett to be a Member of the Royal Commission on Marriage and Divorce.

Given at Our Court at Saint James's the First day of November, 1951 ;
In the Fifteenth Year of Our Reign.

By His Majesty's Command.

Sgd. *David Maxwell Fyfe.*

LIEUTENANT-COLONEL SIR CHARLES WILFRID BENNETT, BARONET, T.D.

To be a Member of the Royal Commission on Marriage and Divorce.

ELIZABETH R.

ELIZABETH THE SECOND, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas QUEEN, Defender of the Faith, to Our Trusty and Well-beloved Sir Walter Russell Brain, Knight, Doctor of Medicine, President of the Royal College of Physicians,

Greeting!

Know ye that We reposing great trust and confidence in your knowledge and ability do by these Presents appoint you the said Sir Walter Russell Brain to be an additional member of the Royal Commission on Marriage and Divorce.

Given at Our Court at Saint James's the Twentieth day of May, 1952 ;
In the First Year of Our Reign.

By Her Majesty's Command.

Sgd. *David Maxwell Fyfe.*

SIR WALTER RUSSELL BRAIN, D.M., P.R.C.P.

To be an additional Member of the Royal Commission on Marriage and Divorce.

ELIZABETH R.

ELIZABETH THE SECOND, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas QUEEN, Defender of the Faith, to Our Trusty and Well-beloved Henry Hollingdrake Maddocks, Esquire, upon whom has been conferred the decoration of the Military Cross,

Greeting!

Know ye that We reposing great trust and confidence in your knowledge and ability do by these Presents appoint you the said Henry Hollingdrake Maddocks to be a Member of the Royal Commission on Marriage and Divorce, in the room of Our Trusty and Well-beloved Sir Charles Wilfrid Bennett, Baronet, upon whom had been conferred the Territorial Decoration, deceased.

Given at Our Court at Saint James's the Twentieth day of May, 1952 ;
In the First Year of Our Reign.

By Her Majesty's Command.

Sgd. *David Maxwell Fyfe.*

HENRY HOLLINGDRAKE MADDOCKS, ESQUIRE, M.C.

To be a Member of the Royal Commission on Marriage and Divorce.

NOTE.—Mr. Daniel Hopkin accepted an invitation to become a Member but died before the Royal Warrant was signed.

Mrs. Mabel Ridealgh resigned in September, 1951.

Sir Wilfrid Bennett died on 25th April, 1952.

Dr. Violet Robertson died on 3rd October, 1954.

Mr. Thomas Young, O.B.E., was promoted to be a Commander of the Most Excellent Order of the British Empire in January, 1953. He was appointed a Sheriff-Substitute of the Sheriffdom of Lanark as from 1st November, 1955.

Lord Keith was appointed a Lord of Appeal in Ordinary and took the title of Lord Keith of Avonholm in October, 1953.

Mr. James Walker, Q.C., was appointed to be a Senator of the College of Justice in Scotland in February, 1954.

The honour of a baronetcy was conferred on Sir Russell Brain in June, 1954.

CONTENTS

	<i>Page</i>
ROYAL WARRANTS	iii
INTRODUCTION	1
HISTORICAL SUMMARY OF THE DIVORCE LAW	3

PART I—THE GROUNDS OF DIVORCE

Chapter 1—GENERAL CONSIDERATIONS	7
Chapter 2—THE SUGGESTED NEW BASIS FOR DIVORCE	12
THE PRINCIPLE ON WHICH DIVORCE IS AT PRESENT GRANTED	12
PROPOSALS FOR THE INTRODUCTION OF THE PRINCIPLE OF BREAKDOWN OF MARRIAGE	12
VIEWS OF THE COMMISSION	13
Chapter 3—OTHER SUGGESTED NEW GROUNDS OF DIVORCE	28
Chapter 4—SUGGESTED ALTERATIONS OF THE PRESENT GROUNDS OF DIVORCE	37
ADULTERY: ENGLAND AND SCOTLAND	37
CRUELTY: ENGLAND AND SCOTLAND	38
DESERTION: ENGLAND	43
DESERTION: SCOTLAND	50
INSANITY: ENGLAND AND SCOTLAND	54
SODOMY AND BESTIALITY: ENGLAND AND SCOTLAND	63
Chapter 5—RESTRICTIONS	64
Chapter 6—BARS TO RELIEF	66
Chapter 7—SPECIAL DEFENCES	74

PART II—NULLITY OF MARRIAGE

A. ENGLAND	79
B. SCOTLAND	85

PART III—OTHER REMEDIES

JUDICIAL SEPARATION	87
RESTITUTION OF CONJUGAL RIGHTS: ENGLAND	91
JACTITATION OF MARRIAGE: ENGLAND	92

PART IV—MARRIAGE GUIDANCE AND CONCILIATION	93
---	----

PART V—CHILDREN

CHILDREN IN MATRIMONIAL PROCEEDINGS: ENGLAND	103
CHILDREN IN MATRIMONIAL PROCEEDINGS: SCOTLAND	115
REMOVAL OF CHILDREN OUT OF THE COUNTRY: ENGLAND AND SCOTLAND	117

CONTENTS—*continued*

	<i>Page</i>
PART VI—DAMAGES AND COSTS	
DAMAGES 	120
COSTS 	121
PART VII—MAINTENANCE: ALIMENT	
MAINTENANCE FOR A SPOUSE: ENGLAND 	129
PRINCIPLES OF LIABILITY 	129
THE NATURE OF THE PROVISION WHICH CAN BE MADE BY THE HIGH COURT 	140
ALIMENT AND LEGAL RIGHTS: SCOTLAND 	146
MAINTENANCE FOR CHILDREN: ENGLAND AND SCOTLAND 	152
PART VIII—ENFORCEMENT OF MAINTENANCE ORDERS MADE IN THE HIGH COURT	
... 	157
PART IX—PROPERTY RIGHTS BETWEEN HUSBAND AND WIFE	
THE PRESENT LAW: ENGLAND 	162
THE PRESENT LAW: SCOTLAND 	169
EVIDENCE AND PROPOSALS SUBMITTED TO THE COMMISSION 	170
THE COMMISSION'S VIEWS ON THE WITNESSES' PROPOSALS 	175
THE COMMISSION'S PROPOSALS 	180
PART X—VOLUNTARY AGREEMENTS FOR SEPARATION OR MAINTENANCE	
A. ENGLAND 	192
B. SCOTLAND 	195
PART XI—THE COURT WHICH SHOULD HAVE JURISDICTION OVER MATRIMONIAL CAUSES	
A. ENGLAND 	196
B. SCOTLAND 	201
PART XII—THE BASIS OF MATRIMONIAL JURISDICTION AND THE RECOGNITION OF THE JURISDICTION OF OTHER COUNTRIES	
INTRODUCTORY 	204
DIVORCE 	205
NULLITY OF MARRIAGE 	230
MISCELLANEOUS 	239

CONTENTS—*continued*

	<i>Page</i>
PART XIII—THE ADMINISTRATION OF THE LAW	
INTRODUCTORY	242
THE ADMINISTRATION OF THE LAW: ENGLAND	243
THE ADMINISTRATION OF THE LAW: SCOTLAND	255

PART XIV—MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

THE MATRIMONIAL JURISDICTION OF MAGISTRATES' COURTS	261
THE RELIEF PROVIDED BY MAGISTRATES' COURTS	262
CONSTITUTION OF THE COURT DEALING WITH MATRIMONIAL CASES AND THE CONDITIONS OF HEARING	277
ENFORCEMENT OF MAINTENANCE ORDERS	281
PROCEDURAL MATTERS	287
APPEALS	290
CONCURRENT JURISDICTION WITH THE DIVORCE DIVISION OF THE HIGH COURT	293
MISCELLANEOUS MATTERS	295

PART XV—THE LAW PROHIBITING MARRIAGE WITH CERTAIN RELATIONS BY KINDRED OR AFFINITY...	298
--	------------

PART XVI—MISCELLANEOUS MATTERS

LEGITIMACY OF CHILDREN	303
THE EFFECT OF DIVORCE ON A WILL	306
THE RE-APPEARANCE OF A SPOUSE AFTER A DECREE OF PRESUMPTION OF DEATH	307
DISABILITIES CONSEQUENT UPON DIVORCE: SCOTLAND	309
PROTECTION ORDER: SCOTLAND	309

CONCLUSION

SUMMARY OF RECOMMENDATIONS: ENGLAND	310
SUMMARY OF RECOMMENDATIONS: SCOTLAND	328
STATEMENT OF HIS VIEWS BY LORD WALKER	340
NOTE OF DISSENT BY SIR FREDERICK BURROWS	342
APPENDIX I—LISTS OF WITNESSES AND CORRESPONDENTS	345
APPENDIX II—STATISTICS	354
APPENDIX III—GROUNDS OF DIVORCE AND MATRIMONIAL PROPERTY SYSTEMS IN OTHER COUNTRIES	375
APPENDIX IV—DRAFT CODE (JURISDICTION AND RECOGNITION)	394
GENERAL INDEX	397

ROYAL COMMISSION ON MARRIAGE AND DIVORCE 1951-1955

REPORT

To the Queen's Most Excellent Majesty

MAY IT PLEASE YOUR MAJESTY,

We, the undersigned Commissioners, having been appointed by Royal Warrant "to inquire into the law of England and the law of Scotland concerning divorce and other matrimonial causes and into the powers of courts of inferior jurisdiction in matters affecting relations between husband and wife, and to consider whether any changes should be made in the law or its administration, including the law relating to the property rights of husband and wife, both during marriage and after its termination (except by death), having in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and well-being of children; and to consider whether any alteration should be made in the law prohibiting marriage with certain relations by kindred or affinity":

HUMBLY SUBMIT TO YOUR MAJESTY THE FOLLOWING REPORT

INTRODUCTION

Changes in membership

1. The vacancy resulting from the resignation of Mrs. Mabel Ridealgh was filled by the appointment of Mrs. Margaret Allen on 8th October, 1951. With Sir Wilfrid Bennett's sudden death in April, 1952, we lost the assistance of one whom we had come to regard as a wise counsellor and friend, despite the short time he had been with us. The vacancy resulting was filled by the appointment of Mr. H. H. Maddocks.

2. Sir Russell Brain was appointed as an additional member on 20th May, 1952.

3. The death of Dr. Violet Robertson on 3rd October, 1954, deprived us of the help, in the later stages of our deliberations, of a most valued colleague, who had throughout taken an active part in our proceedings and whose wide experience had been of great assistance to us in our task.

Procedure

4. We held our first meeting in private on 8th October, 1951. We then decided to invite evidence from a number of bodies whose activities appeared to have a special bearing on our inquiry. A notice was also published in the Press asking anyone who wished to give evidence to communicate with the Secretary. All who offered or were invited to give evidence were asked in the first instance to submit a statement in writing.

5. Apart from the large number of memoranda which we received in response to these invitations, we also received many letters from private individuals. The letters, which we found very helpful, generally contained accounts of the personal histories of the individuals concerned, and against that background the writers argued for or against various changes in the law. It would have been impracticable to ask all these correspondents to amplify their statements by oral evidence and in most cases we considered

it unnecessary to do so. The facts were set out clearly, and the reasons for the suggestions made were based on the human experience of the writers and needed no further elucidation. As regards the memoranda, in some instances we did not ask those concerned to supplement their written evidence by oral testimony, either because their memoranda were complete in themselves, or had only an indirect bearing upon our terms of reference, or because it was evident that the hearing of evidence would have involved substantial repetition of views on which evidence had already been given by others, or because they themselves did not wish to give oral testimony.

6. A list of the witnesses who gave oral evidence is contained in Appendix I, together with a list of those who, without appearing before us, submitted memoranda.

7. We have held 102 meetings in London and Edinburgh, of which 41 were mainly devoted to the hearing of oral evidence. In all, we heard evidence from 67 organisations and 48 individual witnesses at sittings held in London and Edinburgh. The Minutes of Evidence have been published in daily parts during the course of our proceedings; and an Index to the Minutes of Evidence has been prepared for publication.

8. We decided that as a general rule oral evidence should be taken in public. In a few cases evidence was taken in private, either because the evidence could not properly be given in public, or in order to meet the convenience of expert witnesses whose views we wished to obtain on particular topics under consideration at a more advanced stage of our inquiry. In several such cases the evidence was subsequently published with the agreement of the witnesses concerned.

9. In view of the wide scope of our inquiry we found it necessary to nominate certain members of the Commission to undertake preliminary examination of certain specific aspects and submit recommendations for consideration by the Commission as a whole. Matters of Private International Law were so examined by a committee consisting of Lord Keith of Avonholm and Mr. Justice Pearce; and Dr. G. C. Cheshire, D.C.L., F.B.A., who was co-opted to the committee. The Private International Law Committee held 15 meetings, including 4 meetings devoted partly to the hearing of oral evidence. (A list of witnesses who gave oral evidence is contained in Appendix I.) We should like to take this opportunity of expressing our deep indebtedness to Dr. Cheshire, who gave unstintingly of his time and wealth of knowledge in this complex branch of the law.

10. Preliminary consideration of aspects of our inquiry relating to Scotland was undertaken by the Scottish members, who held meetings for this purpose in Edinburgh. A group of members also met to give preliminary consideration to a large number of procedural matters in the administration of the law in England and Wales.

11. We obtained information about the law and practice relating to the matters embraced by our terms of reference from the following countries: Northern Ireland, the Channel Islands, the Isle of Man, the other Members of the Commonwealth, the Irish Republic, twenty-two European countries and the constituent States of the United States of America. A summary of the grounds of divorce in these countries and an account of the matrimonial property systems in certain of them are contained in Appendix III. In the case of New Zealand (where certain aspects of the law were of particular interest in view of their bearing on proposals put before us by witnesses) we were fortunate in being able to supplement the written information which we had obtained by receiving oral evidence from a judge of

the Supreme Court and a barrister from New Zealand during their visit to England.

12. We wish to express our thanks to all who helped us by giving oral evidence, by submitting written statements, by writing letters, or in other ways. We owe a debt of gratitude to those in other countries who complied with our requests for written information at relatively short notice.

Scope of inquiry and form of Report

13. The scope of our inquiry was very wide, embracing not only the law relating to divorce and other matrimonial proceedings but also the administration of that law in all courts, and the law governing the property rights of husband and wife. Moreover, for the first time, the subject of the inquiry extended to Scotland, as well as to England and Wales. Since in many material respects Scots law and procedure differ from English law and procedure, in this as in other fields, we have at times found it more convenient to separate the consideration of Scotland in our Report from the consideration of England and Wales.

14. We have not been able to reach agreement on all the questions which were before us. This is not, perhaps, surprising when regard is had to the nature of the matters under discussion and to the wide differences of opinion revealed among those who gave evidence. In general, differences of view within the Commission have been set out in the body of the Report. It seemed to us that this would enable us to present more fairly the two sides of questions raising issues of wide social and moral significance.

HISTORICAL SUMMARY OF THE DIVORCE LAW

15. Over the last century the divorce law has twice been reviewed by Royal Commissions; one was appointed in 1850 and the other in 1909; they reported in 1853¹ and 1912², respectively. These inquiries were directed to England and Wales. Evidence was, however, taken about the law and practice in other countries, including Scotland, and the Commission of 1909 had among its members a Judge of the Court of Session.

16. The Report of that Commission contains an interesting and informative account of the development of the law prior to 1909, but as the Report is no longer readily available we think it may be helpful to set out briefly the principal changes which have taken place since the Reformation.

England and Wales

17. The exclusive jurisdiction of the Ecclesiastical Courts over all matters relating to marriage and its dissolution was established at an early date; and appeal lay from these courts to the Pope. In the reign of King Henry VIII relations between Church and State were placed on a fresh basis, the Crown being treated as the supreme authority in both Church and State, and by the Statute of Appeals in 1533, the right of appeal from the Ecclesiastical Courts to Rome was abolished.

18. After the Reformation these courts continued to exercise matrimonial jurisdiction and the principal relief granted included decrees of nullity, decrees

¹ C. 1604, 1852-53.

² Cd. 6478.

for restitution of conjugal rights in cases of desertion and decrees of divorce *a mensa et thoro* (which we should now call decrees of judicial separation) on the grounds of adultery, cruelty and unnatural offences. The courts had, however, no power of granting divorce as the term is understood today, that is to say, of making a decree dissolving the marriage. It appears that in the years immediately after the Reformation in some cases parties regarded themselves as entitled to marry again after (or possibly even without) a decree of divorce *a mensa et thoro*, but by the beginning of the seventeenth century the earlier view prevailed that the courts had no power to dissolve marriages. From then until 1857, the only means of setting aside a valid marriage was by Private Act of Parliament—a practice which developed at the end of the seventeenth century. This process was both slow and expensive, and over the period 1715 to 1852 the total number of dissolutions was, according to the Report of the Royal Commission of 1850, only 244.

19. These arrangements continued unchanged until the middle of the nineteenth century. The situation as it existed in 1850 was summarised in the Report of the Royal Commission of 1909 as follows:

“ . . . according to common law as well as Ecclesiastical law and practice, divorce remained unrecognized ; but the Legislature recognized it, in case of a wife’s adultery and, in case of a husband’s, when his adultery was accompanied with aggravating circumstances, by giving a remedy . . . through what was in form a legislative, but in substance a judicial, proceeding, which was open, as a matter of course, on sufficient evidence, to anyone who was rich enough to pay for it. The cost and inconvenience were, however, so great that the remedy was obviously beyond the means of the great bulk of the community.”

20. At length, a Royal Commission, presided over by Lord Campbell, was appointed in 1850. The Matrimonial Causes Act of 1857, based on the Report of that Commission, abolished the jurisdiction of the Ecclesiastical Courts in matrimonial matters and set up a new court—“The Court for Divorce and Matrimonial Causes”—to exercise that jurisdiction. The most important provision of the Act was, however, the introduction of the petition for the *dissolution* of marriage. This could be presented by the husband on the ground of adultery by his wife or by the wife on the ground that her husband had been guilty of (i) incestuous adultery, (ii) bigamy with adultery, (iii) rape, (iv) sodomy, (v) bestiality, or (vi) adultery coupled either with desertion for two years or upwards, or with cruelty. The more rigorous conditions attached to a petition for divorce at the instance of a woman were not new, but carried forward a practice which had grown up under the procedure for dissolution by Private Act of Parliament. In contrast, in earlier times the Ecclesiastical Courts appear to have granted decrees of divorce *a mensa et thoro* on the same grounds to husband and wife alike, and after the abolition of the matrimonial jurisdiction of those courts, the corresponding relief of judicial separation continued to be granted without distinction to a petitioner of either sex.

21. Further Acts relating to matrimonial causes were passed in the next few years, dealing mainly with ancillary questions relating to property and maintenance, custody of children, and various procedural matters. Then, by the Judicature Act of 1873 all jurisdiction formerly exercised by the Court for Divorce and Matrimonial Causes was assigned to the High Court of Justice and has since then been exercised by the Probate, Divorce and Admiralty Division (to which we afterwards refer as the Divorce Division).

22. A further review of the divorce law was carried out by the Royal Commission on Divorce and Matrimonial Causes, which was appointed in 1909 and was presided over by Lord Gorell. The Commission by a majority

(the minority including the then Archbishop of York) recommended that the grounds for dissolving marriage should be (i) adultery, (ii) wilful desertion for three years and upwards, (iii) cruelty, (iv) incurable insanity after five years' confinement, (v) habitual drunkenness found incurable after three years from the first order of separation; and (vi) imprisonment under commuted death sentence. The Commission also recommended that the law should be amended so as to place the two sexes on an equal footing as regards the grounds on which divorce might be obtained; and that certain additional grounds of nullity should be introduced.

23. A quarter of a century was to elapse before any one of the main recommendations of the Gorell Commission for the introduction of additional grounds of divorce was given legislative effect. Between 1912 and 1937 unsuccessful attempts to implement various recommendations of the Commission were made by Lord Gorell (son of the Chairman of the Commission), Lord Buckmaster and Mr. Holford Knight, M.P. The first World War intervened to prevent any early action on the Report. In the immediate post-war years, a major social issue on which public attention was focussed was the removal of women's disabilities, and this was reflected in the sphere of matrimonial law by the passage in 1923 of an Act (sponsored by Lord Buckmaster) which empowered a wife to present a petition for divorce on the ground of adultery (without more) by her husband.

24. Further changes did not come until 1937. It may therefore be said that in the years 1858 to 1937 adultery remained substantially the sole ground of divorce in England and Wales.

25. Earlier attempts to give effect to recommendations of the Gorell Commission bore fruit in 1937 when a Private Member's Bill, sponsored by Mr. A. P. (now Sir Alan) Herbert, received enactment. The Matrimonial Causes Act, 1937 (the "Herbert Act") introduced the following additional grounds of divorce—(i) wilful desertion for three years and upwards, (ii) cruelty, (iii) incurable insanity after five years' confinement. (At the outset the Bill provided for the introduction of habitual drunkenness and imprisonment under commuted death sentence as additional grounds, but these clauses were dropped.) The same Act introduced, in substance, the additional grounds of nullity which the Gorell Commission had recommended.

26. Various minor amendments were made in the law after 1937 and in 1949 the wife was given the right to apply to the High Court for maintenance on the ground of her husband's failure to provide reasonable maintenance for herself or the children. The statutory provisions relating to matrimonial causes are now consolidated in the Matrimonial Causes Act, 1950.

Scotland

27. The development of the divorce law in Scotland presents a marked contrast. First, as regards the grounds of divorce, in Scotland adultery and desertion have been recognised as grounds of dissolution of marriage since the Reformation. From that time, the grounds of divorce remained unchanged until 1938. Secondly, since the introduction of divorce in 1560, no distinction has been made between the sexes in respect of the grounds on which divorce may be obtained.

28. Before the Reformation, in Scotland, as in England, jurisdiction in matrimonial matters rested with the Ecclesiastical Courts. Decrees of divorce granted by those courts did not in any sense sever the marriage bond, and were in effect decrees of judicial separation. Dissolution of marriage on the ground of adultery was not introduced into Scotland by statute, but immediately after the Reformation the courts held it to be the law of the country. The courts appear to have adopted a similar attitude as regards desertion,

and in this case wilful desertion as a ground of dissolution of marriage was confirmed by statute in 1573, four years being fixed as the minimum period during which the desertion must subsist.

29. The Conjugal Rights (Scotland) Amendment Act, 1861, dispensed with the need for the pursuer to institute various preliminary proceedings before raising an action for divorce on the ground of desertion. The minimum qualifying period was reduced from four to three years by the Divorce (Scotland) Act, 1938.

30. The Act of 1938 also introduced the additional grounds of cruelty, insanity, sodomy and bestiality.

31. By Section 73 of the Licensing (Scotland) Act, 1903, habitual drunkenness (as defined in the Act) is the equivalent of cruelty for the purpose of obtaining a decree of judicial separation. The Divorce Act of 1938 enacted that any cruelty that would justify a judicial separation should be a ground of divorce; therefore, since habitual drunkenness (as so defined) had been placed in the same category as cruelty, it has, in effect, been an additional ground for divorce in Scotland since 1938.

32. Divorce jurisdiction after the Reformation passed into the hands of the Commissary Court of Edinburgh with appeal to the Court of Session. On the abolition of this jurisdiction, by the Court of Session Act, 1830, exclusive jurisdiction in divorce was vested in the Court of Session, where it has since remained.

33. In Scotland there are no grounds of nullity corresponding to those introduced in England and Wales by the English Act of 1937. Comparable provision was included in the Scottish Bill introduced at the end of 1937, but the relevant clause was subsequently withdrawn without a division.

PART I

THE GROUNDS OF DIVORCE

CHAPTER 1

GENERAL CONSIDERATIONS

The basis of our approach

34. We were enjoined by our terms of reference not only to consider the divorce laws of England and of Scotland but also to have in mind during our consideration of them "the need to promote healthy and happy married life and to safeguard the interests and well-being of children". These phrases underline the grave responsibility of our task. To make recommendations for divorce is to put forward proposals which, if adopted, are bound to have a profound effect upon the well-being of the community and the happiness or misery of many of its members.

35. The Western world has recognised that it is in the best interests of all concerned—the community, the parties to a marriage and their children—that marriage should be monogamous and that it should last for life. It has also always recognised that owing to human frailty, some marriages will not endure for life, and that in certain circumstances it is right that a spouse should be released from the obligations of marriage. There are, and always have been, differences of view as to whether in such circumstances the marriage tie should be dissolved and the parties set free to enter into new marriages, or whether the parties should merely be legally separated, without dissolution of the marriage tie.

36. By the law of England and of Scotland marriage is the voluntary union for life of one man and one woman to the exclusion of all others. This means that on entering marriage husband and wife must intend that their marriage shall be for life. The State has, however, recognised that in certain circumstances it would be contrary to public policy and would inflict hardship on individuals if the marriage could not be dissolved. It has accordingly made provision whereby in circumstances defined by the law the marriage may be dissolved by the courts and the parties set free to marry again.

37. We have accepted these views on marriage and divorce as the basis of our approach to our task. Indeed, we think that they are implicit in our terms of reference. It is obvious that life-long marriage is the basis of a secure and stable family life, and that to ensure their well-being children must have that background. We have therefore had in mind throughout our inquiry the importance of seeking ways and means of strengthening the resolution of husband and wife to realise the ideal of a partnership for life. Nevertheless, we recognise that some marriages will fall short of this ideal and we are all agreed that it is right that in certain circumstances divorce should be allowed. As will be seen, however, there are differences of opinion among us as to the circumstances which would justify dissolution of marriage and as to the effects on the stability of marriage which would result from changes in the existing legal provisions for its dissolution.

38. This Report will contain no discussion of what may be called the religious aspects of marriage and divorce, but it must not be thought that these aspects have been overlooked. We have had evidence from Christian Churches and other religious bodies and have done our best to weigh that

evidence, together with all the other evidence laid before us. We have, however, conceived it to be our duty to examine the problems before us from the point of view of the State, which has to legislate for all its citizens, whatever their religious beliefs may be.

Background of inquiry

39. The large number of marriages which each year are ending in the divorce court is a matter of grave concern. It was to be expected that immediately after the last war there would be a substantial increase in the number of divorces, as a consequence of the strain and uncertainty of life in wartime and the long separations often imposed. There was an increase after the 1914-1918 war, but it was by comparison modest. The Registrar General has illustrated this strikingly for England and Wales: "In terms of numbers, the effect of the First World War was to cause 15 *hundred* more petitions to be filed each year and of the Second World War to cause 20 *thousand* more petitions to be filed each year"¹. Scotland presents a similar picture, though the increase has not been so great².

40. The disquieting feature is that the divorce rate is still so high. In 1954 there were 27,471 divorces in England and Wales and 2,200 in Scotland, compared with 4,735 and 637, respectively, in 1937. We do not know whether the 1954 figures reflect to any significant extent the direct effects of the war; it would seem likely that both over-hasty "war marriages" and marriages broken by the war had for the most part already been dissolved before 1954.

41. There is, however, an important factor which must be taken into account in any comparison between the present divorce rate and that which existed before the last war. The Matrimonial Causes Act of 1937 for the first time gave the remedy of divorce for cruelty and desertion in England. Many people can now get a divorce who could not get one before. Therefore the higher divorce rate since 1937 does not simply reflect recently, the provision in both countries of legal aid has made divorce for desertion since the 16th century, the introduction of the additional grounds in that country in 1938 is a factor of much less significance. More recently, the provision in both countries of legal aid has made divorce available to people who were previously unable to afford it. The sharp rise in the number of divorces in 1952 was largely due to the fact that cases were being brought under legal aid on grounds which had arisen many years ago.

42. Nevertheless, when full allowance is made for all these factors, the divorce figures must still give rise to grave anxiety. Weighing all the evidence before us, we are satisfied that marriages are now breaking up which in the past would have held together.

The problem of marriage failure

43. This disturbing situation is attributable to a variety of factors, some of which are in themselves socially desirable and, in their other aspects, of

¹ *The Registrar General's Statistical Review of England and Wales for the Five Years 1946-1950, Text, Civil*, p. 57.

² The following figures, taken from Appendix II, are of interest:

<i>Estimated percentages of marriages terminated by divorce</i>							
<i>England and Wales</i>							<i>Scotland</i>
1911	...	...	...	...	...	0.2	0.7
1922	...	...	...	...	...	0.8	1.5
1937	...	...	...	...	...	1.6	1.9
1950	...	...	...	...	...	7.1	5.1
1953	...	...	...	...	...	7.0	5.2
1954	...	...	...	...	...	6.7	4.9

benefit to the community. We set out briefly what we consider are significant elements in a complex problem.

44. In the first place, marriages today are at risk to a greater extent than formerly. The complexity of modern life multiplies the potential causes of disagreement and the possibilities of friction between husband and wife. And the conditions of life today are such as to subject many marriages to additional strain. The scarcity of houses, for instance, prevents many young couples from starting their married life in a home of their own. Some of them then postpone having children, and this in itself can be a factor in marital disharmony. Moreover, people are marrying at an earlier age, when they may not be so apt to choose their partners wisely; statistics record a relatively high proportion of casualties in marriages where the wife married at a very early age³.

45. It must also be recognised that greater demands are now made of marriage, consequent on the spread of education, higher standards of living and the social and economic emancipation of women. The last is probably the most important. Women are no longer content to endure the treatment which in past times their inferior position obliged them to suffer. They expect of marriage that it shall be an equal partnership; and rightly so. But the working out of this ideal exposes marriages to new strains. Some husbands find it difficult to accept the changed position of women: some wives do not appreciate that their new rights do not release them from the obligations arising out of marriage itself and, indeed, bring in their train certain new responsibilities.

46. Moreover, in the last thirty or forty years there have been rapid and far-reaching social changes—changes which if not brought about, were certainly accelerated by the upheavals of two world wars. Old restraints, such as social penalties on sexual relations outside marriage, have been weakened and new ideals to take their place are still in process of formation. It is perhaps inevitable that at such a time there should be a tendency to regard the assertion of one's own individuality as a right, and to pursue one's personal satisfaction, reckless of the consequences to others. The teaching of modern psychology has been widely interpreted as laying emphasis on self-expression and the harmfulness of repression, with the consequent assumption that much that had previously held sexual licence in check could be jettisoned. The wider spread of knowledge in matters of sex is of great value but may have produced in the popular mind an undue emphasis on the over-riding importance of a satisfactory sex relationship without a similar emphasis on the other stable and enduring factors of a lasting marriage.

47. There is a further factor in the problem of marriage breakdown, which is more dangerous, because more insidious in its effects, than any of the others. In fact, we believe it lies at the root of the problem. There is a tendency to take the duties and responsibilities of marriage less seriously than formerly. Yet if, as we have said, more is now asked of marriage, it follows that more, not less, should be put into it. The result of this outlook is that there is less disposition to overcome difficulties and to put up with the rubs of daily life and, in consequence, there is an increasing disposition to regard divorce, not as the last resort, but as the obvious way out when things begin to go wrong. In other words, remedies which are intended for the relief of real hardship are used in cases where relief should be unnecessary if a proper view of their marriage obligations were taken by husband and wife.

³ See Tables 11 and 13, Appendix II.

48. The change in the community's attitude to divorce has some share in responsibility for this situation. The pendulum has swung far to the side of tolerance, and in consequence relatives and friends may be inclined too readily to acquiesce in, if not to encourage, divorce as a way out when marriage failure threatens. Nor should we ignore the harm which may be done to the less stable and the less mature by the undue publicity which accompanies a frequent change of partner in the case of someone who is well-known to the public.

49. We do not wish to suggest that this outlook on marriage has spread throughout the community; the majority of people are still ready to work hard to make their marriage a success. But its growth is insidious and endangers the whole stability of marriage.

Remedies for the problem of marriage failure

50. We do not think that the remedy for the problem of marriage failure lies in making divorce more difficult. In our opinion, the roots of the evil go too deep for such a course to be effective in dealing with the tendency to look to divorce as the obvious way out. We had no evidence which suggested that public opinion would support a restriction of facilities for divorce. We were impressed, too, by the fact that witnesses who would, in principle, have favoured this course recognised that it would not be practicable, in present circumstances, to adopt it. We ourselves believe that without a radical change in the general attitude towards divorce, to abolish or restrict the scope of any of the present grounds for divorce would be bound to fail in its object of checking breakdown of marriage. People who were minded to get a divorce, and who were prepared if necessary to resort to deception to that end, would usually manage to get one. Those of us who, as we point out in paragraph 139, gravely doubt whether the introduction into England of divorce after three years' desertion has been a benefit to the community, nevertheless recognise that, as things are, the result, if this ground were abolished, would be that the less scrupulous would, instead, avail themselves of the ground of adultery (or pretended adultery), while, at the same time, cases of true hardship would be denied relief.

51. We are convinced that the real remedy for the present situation lies in other directions: in fostering in the individual the will to do his duty by the community; in strengthening his resolution to make marriage a union for life; in inculcating a proper sense of his responsibility towards his children. These objectives can only be achieved by education in the widest sense, by specific instruction before marriage, and by providing facilities for guidance after marriage and for conciliation if breakdown threatens. Much of this work is outside our terms of reference. We have, however, received a great deal of evidence on the need for a comprehensive programme of education and on the desirability of measures to check hasty and ill-considered marriages, and we are, as we explain later, unanimously of the opinion that these important problems should be considered by some suitable body as soon as possible.

52. We strongly support the provision of greater facilities for marriage guidance and conciliation and we make specific recommendations for the encouragement and development of work in this field. We have had evidence that in certain respects the present law hampers efforts to bring husband and wife together again and a majority of the Commission has recommended changes designed to remedy these defects.

53. We also think that our unanimous recommendation that, before making a final decree of divorce, the court must be satisfied about the arrangements

proposed for the children should be of very considerable help in making people face their responsibilities as parents. For divorce would not follow automatically when the ground was proved: the welfare of the children must first be considered. In some cases at least the result might be that people would decide to start life together again for their children's sake.

54. It is our hope that a really marked extension in the work of education, pre-marital instruction, marriage guidance and conciliation would check the tendency, to which we have referred, to resort too readily and too lightly to divorce. Unless this tendency is checked, there is real danger that the conception of marriage as a life-long union of one man with one woman may be abandoned. This would be an irreparable loss to the community. There are some of us who think that if this tendency continues unchecked, it may become necessary to consider whether the community as a whole would not be happier and more stable if it abolished divorce altogether and accepted the inevitable individual hardships that this would entail.

CHAPTER 2

THE SUGGESTED NEW BASIS FOR DIVORCE

55. It is against the background of serious concern about the present attitude to divorce, and its consequent high rate, that we have considered whether to recommend any alteration of the grounds of divorce.

THE PRINCIPLE ON WHICH DIVORCE IS AT PRESENT GRANTED

56. In both England and Scotland the existing divorce law is founded on what is called, for brevity, the "doctrine of the matrimonial offence". Certain acts (which are termed "matrimonial offences") are regarded as being fundamentally incompatible with the undertakings entered into at marriage; the commission of these acts by one party to the marriage gives to the other party an option to have the marriage terminated by divorce. With one exception (that of insanity, to which special considerations apply), all the present grounds of divorce, being conduct of a grave nature which cuts at the root of the marriage, conform to this principle.

57. Some witnesses strongly supported the retention of the matrimonial offence as the determining principle of the divorce law: others argued that the time had come to recognise a new principle, namely, that the basis of granting divorce should be that the marriage had irretrievably broken down.

PROPOSALS FOR THE INTRODUCTION OF THE PRINCIPLE OF BREAKDOWN OF MARRIAGE

Breakdown of marriage as a comprehensive ground of divorce

58. Some witnesses considered that the existing divorce law should be re-framed on the basis of this new principle, which, for convenience, we call the "doctrine of breakdown of marriage". They recommended that the existing grounds of divorce should be abolished and their place taken by a single, comprehensive ground which would allow divorce to be granted if it could be proved that the marriage had irretrievably broken down. These witnesses argued that the matrimonial offences on which divorce is founded under the present law are not usually the real causes of the breakdown of a marriage but merely its symptoms: that the result of basing the grounds of divorce on symptoms is to deny relief where it should be available because the marriage is completely at an end, and to grant divorce (e.g., for an isolated act of adultery which had been repented of) where there is no reason why the marriage should not continue. They alleged that people deliberately commit offences, or pretend to commit them, in order to supply grounds for divorce, and suggested that the solution is to require the court to determine in each case whether the marriage has broken down beyond hope of reconciliation.

59. The majority of those witnesses who supported the doctrine of breakdown of marriage favoured the addition to the present law of one or both of the following new grounds:

- (i) divorce by the mutual consent of husband and wife;
- (ii) divorce at the option of either spouse after a period of separation.

Divorce by consent

60. The essential feature of the various proposals for divorce by consent is that husband and wife should be entitled to come before a judge and ask for a divorce simply on the footing that they both seriously desire

their marriage to be dissolved, and, if the judge were satisfied that the consent had been freely given, divorce should be granted. Safeguards were suggested designed to prevent divorce on this ground from being lightly obtained.

61. It was argued that the parties to the marriage are in the best position to know if it has failed, and that it follows from the concept of the individual as a free and responsible person that husband and wife should be allowed to terminate their marriage if they are both agreed to take this step. It was said that among the divorces granted under the present law many are in fact divorces by consent, since, in an undefended case, it is very difficult for the court to detect whether there has been collusion, and further, ground for divorce may be provided by one party in circumstances which do not amount to legal collusion. It was argued that this brings the law into disrepute, because it is regarded as favouring the many who are unscrupulous at the expense of the few who are too scrupulous to resort to an "arranged" divorce. The introduction of divorce by consent would therefore not make divorce any easier than it is at present (since it would merely allow people to do openly what they now do by subterfuge) and, in the view of the witnesses, it would result in an "honest" divorce law which would command the respect of the public.

Divorce at the option of either spouse after a period of separation

62. In putting forward proposals which would allow either spouse to obtain a divorce after the spouses had lived apart for a given period (the suggestions ranged from two to seven years' separation) witnesses had primarily in mind the situation where ground for divorce exists under the present law but the injured spouse has not taken his legal remedy. Such proposals would also enable divorce to be obtained where there is no ground for divorce under the present law.

63. In the Bill introduced by Mrs. Eirene White, M.P. (which was withdrawn after Second Reading on the Government's undertaking to set up a Royal Commission) the period of separation was seven years, there was a condition that there should be no reasonable prospect of reconciliation, and there were certain financial provisos designed to protect the position of a wife.

64. The advocates of proposals on these lines argued that if a marriage has irretrievably broken down it is in the interests of the parties to the marriage, of any children of the marriage, and of the community, that the marriage should be ended by divorce, and the parties set free to enter into new marriages, if they so wish. They pointed out that without such freedom illicit unions are formed, and illegitimate children often begotten. In their experience, many of those illicit unions have all the qualities of an enduring marriage and it is a grievous hardship to the parties that they cannot be legally married and have legitimate children. But apart from the individual hardship, it was said to be against the interests of public morality that there should be such illicit unions in that they tend to bring the status of marriage into disrepute.

VIEWS OF THE COMMISSION

65. We are, with one exception¹, all agreed that the present law based on the doctrine of the matrimonial offence should be retained. We differ, however, on whether or not it would be in the interests of the community as a whole that an additional ground should be introduced based on the

¹ Lord Walker, whose views are set out at pp. 340-341.

principle that there should be dissolution of a marriage which has irretrievably broken down.

66. Nine members² of the Commission are opposed to the introduction of the doctrine of breakdown of marriage, in any form, because they consider that it would be gravely detrimental to the well-being of the community. (See paragraph 69.)

67. Nine members³ of the Commission consider that the time has come to introduce the doctrine of breakdown of marriage to a limited extent. They recommend that, where husband and wife have lived separate and apart for seven years, it should be possible for either spouse to obtain a dissolution of the marriage, if the other spouse does not object. (See paragraph 70.)

68. Four⁴ of these nine members, however, consider that it would be desirable to widen the scope of the new ground in order to allow a husband or wife to obtain a dissolution of the marriage, notwithstanding the other spouse's objection, if he or she could satisfy the court that the separation was in part due to the unreasonable conduct of the other spouse. (See paragraph 71.)

Views of those nine members² who are opposed to the introduction of the principle of breakdown of marriage

69. (i) We have rejected the introduction into the law of the principle that a marriage should be ended if it has irretrievably broken down, because, as we show later, in whatever form that principle might be introduced it would entail the recognition of divorce by consent. In its more fully developed forms it would also entail the recognition of divorce against the will of a spouse who had committed no recognised matrimonial offence. It is the introduction of either of these elements that we regard as fundamentally objectionable and as containing the seeds of grave damage to marriage as an institution.

(ii) We believe that the consequences of providing the "easy way out" afforded by divorce by consent would be disastrous to stability in marriage. The inevitable result would be the granting of divorces in cases where no real necessity for the remedy had arisen. In other words, the divorce rate would be swollen by the failure of marriages which would otherwise have held together with advantage to both parties as well as to children. People would then come to look upon marriage less and less as a life-long union and more and more as one to be ended if things begin to go wrong, and there would be a very real risk that in the end widespread divorce would come to be an accepted feature of our society. As those attitudes spread they would undermine, and ultimately destroy, the concept of life-long marriage.

(iii) The evils which would result if the community were to come to accept divorce as the obvious way out of all marriage difficulties need no elaboration, save in one respect—the consequences for children. We were enjoined to pay special attention to the "interests and well-being of children". We are deeply concerned about the effect on children of the present divorce rate: their suffering would be multiplied if divorce were to become more widespread. The best home for children is of course a happy home, but in our

² Lord Morton of Henryton, Mr. Beloe, Lady Bragg, Sir Russell Brain, Sir Frederick Burrows, Mr. Flecker, Mr. Lawrence, Mr. Mace, Mr. Justice Pearce. The late Dr. Violet Robertson had recorded her agreement with the views held by these nine members as set out in paragraph 69 of the Report.

³ Mrs. Allen, Dr. Baird, Mrs. Brace, Mr. Brown, Mrs. Jones-Roberts, Lord Keith of Avonholm, Mr. Maddocks, Lady Portal, Mr. Young.

⁴ Dr. Baird, Mr. Brown, Mrs. Jones-Roberts, Lord Keith of Avonholm.

Views of nine members—continued

opinion (and most of our "expert" witnesses confirmed this) children can put up with a good deal of friction between their parents so long as the home remains intact. The relations between the parents must usually be very bad indeed before a divorce is in the interests of the children.

(iv) If the principle that a marriage should be ended if it has irretrievably broken down is followed to its logical conclusion, then it must be accepted that a spouse who had committed no recognised matrimonial offence could be divorced against his will. In our opinion, this would be so plainly unjust as to be in itself conclusive against the introduction of any ground of divorce which had this result.

(v) Nor do we think that the introduction of grounds based on the principle of breakdown of marriage would be appreciably less dangerous if they were hedged about with the restrictions and safeguards which have been suggested. Apart from the fact that it would be difficult to resist the subsequent removal, step by step, of the restrictions and safeguards, these grounds, even in their most restricted form, are all open to the objection that they permit divorce by the consent of husband and wife.

(vi) We have given our basic objections to the doctrine of breakdown of marriage. We now discuss the proposals which were put to us under this general head, setting out in detail our objections to them.

(1) DIVORCE BY CONSENT

(vii) For the reason given in paragraph 38 we refrain from any discussion of the religious aspect of marriage. Apart altogether from this aspect, we believe that it is fundamentally incompatible with the concept of marriage as a union for life for the parties to be free to put an end to it by agreement. It seems to us self-evident that a marriage cannot be the concern only of the partners to it. If there are children, their interests must be considered. But whether there are children or not, the State must be concerned in the maintenance of a marriage and in its dissolution, because the State has an over-riding responsibility to ensure, in the interests of the community, that the institution of marriage is upheld. For marriage is not merely a civil contract between the parties to it. It is a status arising out of that contract, and, as a status, it concerns the community as well as the parties. If husband and wife were free to terminate their marriage at pleasure, then marriage would become a purely contractual relationship and the interests of the community would receive no recognition.

(viii) As we have pointed out, to give people a right to divorce themselves would be to foster a change in the attitude to marriage which would be disastrous for the nation. People would tend to enter marriage more lightly, and with the reservation that, if it were not a success, they could always agree to put an end to it. And when difficulties arose in married life (as happens in most marriages), there would be much less incentive to overcome them. Husband and wife would be tempted to say to each other, "Let us have a divorce and start again". Thus, divorce would increasingly be sought in circumstances where, if a little effort were made, husband and wife could adjust their differences. Such an attitude would be fatal to stability and security in marriage, which in the end would come to be regarded as a temporary relationship, with divorce as a normal incident of life. For this calamity the State would bear the brunt of the responsibility since, in giving its blessing to divorce by consent, it would in effect have encouraged people to abandon their marriages on the flimsiest provocation.

Views of nine members—continued

(ix) Our objection to divorce by consent is so fundamental that it cannot be met by the provision of conditions or safeguards, however stringent these might be. We think it necessary, however, to comment on one condition, which was stressed by the proponents of divorce by consent. This was that the court must be satisfied that the consent had been freely given. This would put a very difficult burden on the court; and it would usually be impossible to find out if an unwilling spouse had been worn down by pressure into giving a reluctant consent. Thus, the ground would be open to abuse, and a weak or self-sacrificing spouse, who genuinely did not want a divorce, would be left virtually unprotected.

(x) Nor can we accept the argument that because the difficulty of getting a divorce leads to perjury, therefore divorce should be made easier. Opinions differ on the extent to which perjury and collusion are now practised, and for obvious reasons it is impossible to obtain information on which a reliable estimate could be based. We think that some witnesses exaggerated the prevalence of these practices, and our view is supported by the evidence of the representatives of the General Council of the Bar of England and Wales⁵. But we do not dispute that there are some "arranged" divorces under the present law. If two people are determined to get a divorce they may succeed, notwithstanding that the law expressly provides against this. No law can be proof against those who have made up their minds to get round it, and are ready to commit perjury to that end.

(xi) The fact that there are people who have apparently no shame in resorting to such dishonest methods of obtaining a divorce must cause grave concern. The case which is most disturbing to the public conscience is the "hotel adultery". On the other hand, cases of this kind are, we believe, less frequent than is often supposed. Moreover, so long as divorce can be obtained immediately on proof of adultery, the temptation to present false or collusive evidence of adultery must remain. Such deception of the law would obviously lose much of its attraction if immediate divorce were abolished, and no divorce granted in less than, say, three years from the discovery of the offence. The consequent delay would, however, inflict a hardship on the great majority of petitioners against whom a genuine offence had been committed (although their number could be reduced by giving immediate relief in cases of exceptional hardship or depravity) and the unscrupulous could still evade the law by "arranging" either adultery or desertion. The only complete cure would be to allow divorce by consent after a separation of three years or less—a solution which we most emphatically reject.

(xii) The argument that divorce by consent provides a dignified and honourable means of release is perhaps the most insidious of all. There could be no subtler temptation to divorce than the belief that there was a wholly blameless way of terminating a marriage. In our view it is not the function of the law to provide such a means of release; its proper function is to give relief where a wrong has been done. To go beyond this and provide an easy way out would be actively to assist in what can only be regarded as a socially calamitous act.

(2) DIVORCE AT THE OPTION OF EITHER SPOUSE AFTER A PERIOD OF SEPARATION

Mrs. White's Bill

(xiii) Our basic objection to the proposal as it stands in Mrs. White's Bill can be stated quite shortly. It would in effect allow either spouse to

⁵ See Q. 332, Minutes of Evidence, Second Day.

Views of nine members—continued

obtain a divorce simply on the ground that he or she had lived apart from the other spouse for seven years. That would introduce into the law a principle which would have even more damaging consequences for the institution of marriage than divorce by consent, since it would mean that either spouse would be free to terminate the marriage at pleasure. In other words, people would enter marriage knowing that no matter what they did or how their partners felt, they could always get free.

(xiv) At the same time, no married person could ever be sure that he would not be divorced. The introduction into marriage of this sense of insecurity and uncertainty would have a most disturbing effect on family life, which would ultimately react on all members of the community.

(xv) To vest in a husband or wife the right to divorce a spouse who, *ex hypothesi*, had committed no recognised matrimonial offence, and who did not want a divorce, would result in grave injustice. It would, for example, allow a man who had committed adultery or had been cruel to his wife to leave her and subsequently to divorce her against her will. This would violate a principle which has been long-established in the law, namely, that a man shall not be allowed "to take advantage of his own wrong". The wife would have a divorce forced on her. She might have religious or conscientious objections to divorce. In any case, whatever her objection might be, whether more or less reputable, she had married on the footing that provided she did not give her husband ground to divorce her, she would retain the status of wife for life, with all that implies in position in the community, rights of maintenance and other financial rights.

(xvi) Witnesses who supported this proposal argued that the distinction between "guilt" and "innocence" in matrimonial cases was unreal and artificial; a spouse who had committed a matrimonial offence might have been driven to it by the behaviour of the other spouse, who should then be regarded as morally responsible for the breakdown of the marriage: that in any event the marriage had broken down, and there was no point in retaining the legal tie when the essential content of the marriage had gone for ever: that the court could ensure that proper financial and other provision was made for the wife and any children of the marriage.

(xvii) This argument leaves out of account the fact that in many cases (perhaps even the majority) the spouse who has committed a matrimonial offence has been mainly responsible for the breakdown; in some the blame lies entirely on his side. There is the case of the long and happy marriage broken by the husband's infatuation for a younger woman: the case of the wife treated with gross cruelty by her husband before he deserts her: the case of the deserted husband left with a young family to bring up. In cases such as these, if the injured spouse does not wish to be divorced, it would, we feel, be repugnant to contemplate the possibility of forcing a divorce on that person.

(xviii) Nor can we agree that it would be possible to ensure that adequate financial provision was made for the first wife and family. They would usually be bound to suffer if the husband married again, since there are very few men who can afford to support two families, and the man's natural impulse would be to look after the wife and family with whom he was living. It is not easy to make sure that the wife and children are supported when the husband is merely living with another woman and when the wife's claim is at least paramount in law; but their position is much less secure if a divorce has given the husband a second wife and family with a legal right to maintenance. In such cases the court is usually faced with the

Views of nine members—*continued*

situation that there is not enough money to go round. To get over this difficulty it was suggested that the support of the first wife and family could be made a first charge on the husband's resources; but such discrimination against the second wife and family would be undesirable. Their needs cannot be ignored. The State would have allowed the man to divorce his first wife and marry again; it would be wrong that it should put the second wife (who might have married in ignorance of her husband's financial obligations) in a position of complete insecurity, with no certain claim to her husband's support so long as his first wife lived.

(xix) The strength of this objection was recognised by a metropolitan magistrate of wide experience who was very sympathetic to a ground of this type, in the interests of the children of illicit unions. He said:

"When I was thinking this over last night I wrote . . . these words: 'This is probably too idealistic and divorced from reality'. In other words, having thought it over for twelve months, and bearing in mind, so far as my own court is concerned, that most of the husbands cannot afford to keep one wife and rely on national assistance, this proposal, I think, would only be applicable to people of substance."⁶

(xx) As the law stands, the wife would also lose her pension rights under the National Insurance Acts and her rights in her husband's estate under the Inheritance (Family Provision) Act, 1938, as extended by the Intestates' Estates Act, 1952. Our witnesses considered that her position under these Acts could be secured by legislation. While something could be done to help her, we do not think that her position could be adequately secured, since the claims of the second wife (who would be the husband's widow) could not be entirely ignored. Further, we do not see how it could conceivably be possible to safeguard the first wife's position under any private pension scheme from which she would have benefited had she remained a wife; and such schemes are becoming increasingly important as a means of providing for the future.

(xxi) Some witnesses stressed the length of the period of separation—seven years—arguing that it would be a safeguard against light recourse to this ground of divorce, and that it was, in fact, proof in itself that the marriage was at an end. Even if this argument were accepted, certain vital objections remain. In the first place, the length of the period does not affect our objection in principle to this proposal, namely, that it confers an absolute right on either spouse to divorce the other. In the second place, we consider that there would soon be pressure to reduce this period, on the ground that it was unnecessary to keep people tied for so long; that five years, or even three years, would be sufficient to show that the marriage was at an end. Some witnesses admitted that they could see no particular justification for the period of seven years and that a shorter period would be enough. The promoter of the Bill said that she personally would feel that, say, four years would be long enough. We think that it would be difficult to resist a determined attack on the length of the period, since this must necessarily be arbitrary, and that the period would in fact be progressively reduced, until in the end it became so short that it could afford no sort of evidence that the marriage had broken down.

(xxii) Nor do we think that the assumption that the introduction of this ground would result in a substantial reduction in the number of illicit unions is valid. The number of existing illicit unions would doubtless be reduced to

⁶ Q. 7686, Minutes of Evidence, Thirty-second Day (Mr. F. J. Powell).

Views of nine members—*continued*

some extent; but we question whether the reduction would be so large as has been suggested, since we doubt if the man concerned would always be willing to take on the responsibilities of marriage. Moreover, the availability of this ground of divorce would not deter people from entering into such unions in the future; on the contrary, many would be encouraged to do so, secure in the knowledge that after the required number of years had passed, they would be free to marry.

(xxiii) Encouragement would also be given to those people who, unattached themselves, have no moral scruples about breaking up someone else's marriage. We have particularly in mind the type of woman who would find it much more profitable to entice a husband away from his wife and family if she could be sure that ultimately a divorce could be forced on the wife.

(xxiv) The conclusion which we feel must be drawn from the arguments and considerations we have set out is that not merely would this ground of divorce allow people to behave badly and break up their marriage, and then profit from their own misdoings by obtaining a divorce, but it would be primarily those husbands and wives who took their marriages more lightly and those persons who sought to break up a home, or at least acquiesced in its break-up, who would benefit.

Possible modifications of Mrs. White's Bill

(xxv) We were impressed by the sincerity of witnesses who had no personal interest in Mrs. White's Bill but were genuinely concerned to bring relief to cases of hardship. Further, we received a large number of letters from private individuals giving details of the difficulties and unhappiness of their situation. We recognise that in such cases divorce may be refused by the spouse who has legal ground for it from unworthy motives—jealousy, spite, vindictiveness. We therefore examined various modifications of the proposal in Mrs. White's Bill to see if it would be possible to meet the objections we have set out above.

(xxvi) In other countries where there is a ground of divorce which is not a matrimonial offence, and under which either party has the right to bring a petition, there is usually some degree of protection for the innocent spouse who does not wish to be divorced⁷. In New Zealand, for instance, either party may petition for divorce after a separation (by agreement or under a court order) has lasted for three years, but if the respondent opposes the granting of a divorce, and it is proved to the satisfaction of the court that the separation was due to the petitioner's "wrongful act or conduct", then the court must refuse the divorce. This proviso was introduced in response to strong public protest that without it the ground did grave injustice to an innocent party who objected to divorce. It has also been applied to a new ground of divorce—any separation lasting for seven years or more—which was introduced in New Zealand in 1953.

(xxvii) There are two obvious objections to the New Zealand proviso. First, it might well be difficult for the innocent respondent, after the lapse of years, to produce evidence that the petitioner's conduct had been responsible for the separation. (It was admitted by a New Zealand witness that this was sometimes difficult⁸.) Secondly, it is not right that an innocent party should be put to the trouble, unpleasantness and expense of defending the suit in order that he should not be divorced. If there were children, an innocent spouse might feel that in their interests he could not risk

⁷ See Appendix III.

⁸ See Q. 9332, Minutes of Evidence, Thirty-ninth Day (Mr. W. E. Leicester).

Views of nine members—continued

the publicity of a defended suit. There is also the danger that improper pressure might be brought to bear on a spouse to dissuade him from defending the suit.

(xxviii) In order to meet these criticisms it has been suggested that if the respondent objected to a divorce, the burden should lie on the petitioner to establish that the respondent's unreasonable conduct had been responsible, or in part responsible, for the separation. But this would amount to the creation of a new matrimonial offence, which would be less than any offence at present recognised. And if the petitioner's conduct need be only in part responsible for the separation, then a spouse could be divorced against his will although his share of the responsibility for the separation had been substantially less than that of the spouse who divorced him.

(xxix) These criticisms, though important, are, however, subsidiary. Our chief criticism is that neither of these provisos gets rid of the basic objection that a spouse who had committed no recognised matrimonial offence could be divorced against his will.

(xxx) There is only one solution which (apart from the possibility of pressure) would do away with the element of injustice, namely, that divorce should be granted only if the other spouse did not object. This would fully safeguard the position of a spouse who did not wish the marriage to be dissolved, since he or she would simply have to record that fact and the divorce could not be obtained.

(xxxi) Such a ground would, however, at the best be of extremely limited benefit as a means of relief for those cases of hardship which witnesses had particularly in mind. A wife who had refused out of malice to divorce her husband would certainly avail herself of her right to object if he sought to divorce her after seven years' separation. There may, of course, be cases where a spouse having ground for divorce does not take it out of apathy or inertia. If this were the reason, the petitioning spouse would usually be able to get a divorce under the proposal. But such cases would be rare.

(xxxii) At the same time the ground is open to the grave objection that it would introduce divorce by consent. A husband and wife need only agree to separate on the footing that one of them, at the end of seven years, would bring a petition for divorce which the other would not oppose. No doubt (as our witnesses contended) there would in fact be few divorces by consent under a ground requiring a separation of seven years. It is most unlikely that there would be more than a handful of people so set on divorce that they would wait so long for it, yet so law-abiding that they would not seek to obtain it in three years by "arranging" desertion or more immediately by committing or pretending to commit adultery. But that is not an argument in support of this ground. This new and, in our opinion, most dangerous principle of divorce by consent would find its way into the law under cover of a ground which would do little if anything to check abuse of the present remedies and would relieve few cases of genuine hardship. And if divorce by consent were once admitted, it would be difficult to confine it for long to this restricted form.

(3) BREAKDOWN OF MARRIAGE AS A COMPREHENSIVE GROUND OF DIVORCE

(xxxiii) Witnesses who considered that the existing grounds of divorce should be abolished and their place taken by a single, comprehensive ground argued that divorce would not then be easier to obtain than it is at present; that in fact in some respects it would be more difficult. We do not agree

Views of nine members—*continued*

that in practice the proposal would work out in that way. On the contrary, we think that under such a proposal a spouse who wanted to be free of his marriage would as a rule be able to get a divorce.

(xxxiv) The fundamental criticism of this proposal is that it would set the court an impossible task. To determine whether or not a marriage had completely broken down is really not a triable issue. If the case were undefended and the petitioner maintained that he would never go back to his spouse, and that the marriage was dead, and if his statement were perhaps supported by the evidence of relatives and friends, we do not see how the court could do otherwise than accept what he said and grant a divorce. This would mean that many divorces would in reality be given merely on the ground of incompatibility or for such defects of temperament as should be regarded as coming within the ordinary wear and tear of married life. It would also mean that it would be open to husband and wife to obtain divorce by consent.

(xxxv) In a contested case the court would be in a similar difficulty. It would be practically impossible for a spouse who wished to resist divorce, perhaps for the sake of the children, to prove that the marriage had *not* broken down in face of the other spouse's contention that it had. If, for instance, the husband were living with another woman and there were children of that union, it would be very difficult for the court to hold that the marriage had not broken down, however much the wife might argue that, for her part, she regarded it as still intact. Thus this ground is open not only to the objection that it would lead to divorce by consent, but also to the equally grave objection that it would involve divorce against the will of a spouse who was innocent, or mainly innocent, of responsibility for the breakdown.

Concluding observations

(xxxvi) Our examination of the proposals under which breakdown of marriage would be the criterion of divorce has convinced us that it is in the best interests of the community that the matrimonial offence should remain the determining principle of the divorce law. An element of artificiality must be admitted in the doctrine of the matrimonial offence, and the consequential emphasis on legal guilt and innocence; for in real life it is comparatively rare to find all the right on one side and all the wrong on the other. Still, this doctrine provides a clear and intelligible principle; and it makes for security in marriage, because husbands and wives know that they cannot be divorced unless they have committed one of the matrimonial offences which is ground for divorce. Moreover, these "offences" are not arbitrary ones; in each case a grave injury has been done, which has cut at the root of the concept of marriage as a partnership for life.

(xxxvii) We further believe that in society as it is today people need the external buttress of a system of law which specifies the circumstances in which an individual has the right to ask for his marriage to be dissolved. People have good and bad impulses, and we conceive it to be the function of the law to strengthen the good and to control the bad. We believe that this is the effect of the present law. It acts, for instance, as a strong deterrent to the setting up of illicit unions, because a spouse who is contemplating such a union and his prospective partner both know that there can be no certainty that they will ever be able to marry and have legitimate children.

(xxxviii) At the same time the principle of the matrimonial offence is not rigid: on the contrary, it can be, and has been, adapted to meet the changing

Views of nine members—*continued*

views of society on what constitutes a grave matrimonial wrong. It is now well established, for instance, that cruelty in marriage may take many forms, and the law has recognised that some kinds of mental cruelty may be more grievous than physical blows. In England the development of the doctrine of constructive desertion has afforded relief in other situations of hardship.

(xxxix) Thus, so far as England is concerned, the interpretation of the law has so moved with the times that there are very few cases of real hardship for which no relief is available, if the injured spouse wishes to take his legal remedy. Scots law, owing possibly to its different tradition, has not developed on quite the same lines (the doctrine of constructive desertion, for instance, has not taken root in Scotland) but in our opinion any modification of Scots law which might be considered desirable should be made within the framework of the existing law.

(xl) Finally, we do not think that there is any widespread desire in the country for a material change in the grounds of divorce. We believe that most people consider that the present facilities are sufficient. The evidence we received from Scotland certainly did not indicate any substantial demand for the introduction of new grounds of divorce. In England much of the evidence in support of a radical change in the present divorce law was directed to giving relief in specific cases where divorce cannot at present be obtained, usually because the spouse having ground for divorce does not elect to take his remedy. We recognise that there are cases which, viewed in isolation, would seem to demand a change in the law; but it would not be possible to meet such cases without an extension of the law which, in our view, would bring in its train irreparable harm to the status of marriage.

Views of those nine members⁹ who support the introduction of a new ground of divorce founded on the complete breakdown of the marriage

70. (i) We are of the opinion that it is no longer in the best interests of the community that the remedy of divorce should, in principle, only be available if what is called a matrimonial offence has been committed.

(ii) It is unnecessary to examine closely the sources of this doctrine. Though divorce was recognised in pre-Christian eras and in Roman law and exists generally today in non-Christian communities, there seems little doubt that so far as England and Scotland are concerned modern divorce law developed from views founded on religious sanctions as to conduct justifying divorce *a mensa et thoro* (judicial separation) as distinguished from divorce *a vinculo*. With certain possible exceptions into which it is unnecessary to enter, it may be said that divorce *a vinculo* both here and on the Continent dated from the Reformation¹⁰. Divorce for adultery and desertion is recognised in and forms part of the Westminster Confession of Faith.

(iii) Under the stress of changes in society and the waning influence of religious thought on the pattern of social habits, divorce has tended to be regarded as a measure of relief granted to a spouse from considerations of individual hardship, though the general description of grounds of divorce

⁹ Mrs. Allen, Dr. Baird, Mrs. Brace, Mr. Brown, Mrs. Jones-Roberts, Lord Keith of Avonholm, Mr. Maddocks, Lady Portal, Mr. Young.

¹⁰ Divorce, including divorce by mutual consent, appears to have been generally recognised in England and Wales in Anglo-Saxon times. See *A History of English Law* by W. S. Holdsworth (Third Edition, 1923) and *Welsh Tribal Law and Custom in the Middle Ages* by T. P. Ellis (Oxford University Press, 1936).

Views of nine members—*continued*

as matrimonial offences and the habit of treating the parties to a divorce, one as the innocent party and the other as the guilty party, can no doubt be traced to the conception of divorce as a penalty for breach of matrimonial obligations. There is, however, no obvious reason why a matrimonial offence should be the only ground of divorce, although, as we have said, for historical reasons it may have come to provide the ruling principle in divorce in England and Scotland and to appeal to legal minds accustomed to discourse in a world of legal rights and wrongs. Yet in many countries and with many religions, divorce is not based essentially on any code of matrimonial offences, but is allowed for a variety of grounds thought to be inimical to a realistic marriage state. In England and Scotland this point of view has already received recognition in allowing divorce for incurable insanity.

(iv) We believe that in the vast majority of cases marriage is entered into in the belief and with the intention that it will be a union for life. But it must be recognised that in a considerable number of cases marriage holds out no such assurance. There are, for instance, forced marriages, where parents marry to give a child a name. Some of these, we believe, turn out unexpectedly happy. We have, however, had evidence that in a very considerable number of divorce cases in which there are children of the marriage, there proves to have been a child on the way before the marriage was celebrated. There are marriages among the very young who may naturally lack the maturity of judgment and experience of life necessary to select a partner suitable for a life-long relationship. There are the misfits of all ages who on no reasonable calculations could ever settle down to a stable and normal married life. For all such, release from the marriage tie can only be obtained by the commission of a matrimonial offence, and then only if the other spouse is willing to found on the matrimonial offence to obtain a divorce.

(v) But for whatever reason marriage breaks down, the prevailing law of divorce provides an easy escape from the bond of matrimony for those who are minded to take it. Desertion for three years or, for those who wish a speedier release, the commission of adultery, is all that is needed. For those who are not prepared to resort to such expedients—and we believe the number is by no means negligible—there is, however, no such relief. We think it may be said that the law of divorce as it at present exists is indeed weighted in favour of the least scrupulous, the least honourable and the least sensitive; and that nobody who is ready to provide a ground of divorce, who is careful to avoid any suggestion of connivance or collusion and who has a co-operative spouse, has any difficulty in securing a dissolution of the marriage.

(vi) We do not suggest that all divorce proceeds in this way. Nor do we suggest that the present grounds of divorce have not a proper part to play in the law. Adultery or cruelty or desertion may make married life intolerable or offensive or impossible and it is right that a remedy should then be available to the aggrieved spouse. But there are many cases where marriage breaks down irretrievably and where, as the law stands, no remedy is available.

(vii) We think that the time has come to recognise that matrimonial offences are in many cases merely symptomatic of the breakdown of marriage, and that there should also be provision for divorce in cases where, quite apart from the commission of such offences, the marriage has broken down completely.

Views of nine members—continued

(1) PROPOSAL INTRODUCING THE PRINCIPLE OF BREAKDOWN OF MARRIAGE

(viii) We recommend that a new ground of divorce should be introduced based on the view that, where husband and wife have lived apart for many years, it may be assumed that the marriage has failed. Our proposal is:

An application for dissolution of marriage may be made to the court by either spouse on the ground that the spouses have lived separately for a period of not less than seven years immediately preceding the application, and the court shall pronounce a decree dissolving the marriage where this ground is established, provided that the other spouse does not object.

This proposal recognises that after a separation of seven years a marriage may be said to have completely broken down. By the addition of the proviso the position of a husband or wife who, for whatever reason, does not wish the marriage to be dissolved is fully protected, since that spouse has simply to record his objection and the dissolution cannot be obtained.

(ix) The introduction of this ground would meet the criticism, which in our opinion is justifiably made of the existing law, that if a marriage breaks down irretrievably through the fault of one or both of the spouses, or perhaps through the fault of neither of them, and both wish to be released therefrom, one or other of them must commit a matrimonial offence or commit perjury in order that this end may be achieved.

(x) The suggested new ground would also afford relief in cases where one spouse declines to divorce the other out of apathy and not from any positive objection to divorce.

(xi) We see no danger to the stability of marriage in allowing what is in effect divorce by consent under the stringent safeguard that husband and wife have lived apart for seven years. Nor do we see any reason to fear that this safeguard would subsequently be weakened. We do not believe that the introduction of this new principle of divorce into the law will lessen respect for marriage and undermine it as an institution. On the contrary, by basing dissolution of marriage on a complete breakdown of that union, we are, we think, heightening the respect for true marriage, for the emphasis is then placed on marriage as a real union for life. It is impossible to ignore the fact that at the present time the matrimonial offence is in very many cases only a means of obtaining a dissolution of marriage desired by both parties. Our proposal avoids the distasteful expedient of committing a matrimonial offence to give cause for divorce, lessens undesirable publicity and dispenses with the often unwarrantable assumption that one spouse is more to blame than the other. We would point out, moreover, that it involves a long period of actual separation, thus allowing opportunity for voluntary reconciliation, and in its absence raising a presumption that the marriage has completely broken down.

(xii) Further, our proposal is presented in the light of the views of this Commission on the desirability of pre-marital instruction and its proposals for the encouragement of marriage guidance and conciliation. We live in an age of insecurity. Matrimony, like many other things, is not so secure as it was a hundred or even fifty years ago. But the remedy is to raise the educational and moral standards of the people, to train them for marriage and to guide them during marriage in any problems and difficulties that may arise. If all this fails, if a marriage breaks down, if husband and wife live separate for a long period of years, we see no purpose in keeping the marriage alive in name where neither spouse wishes to maintain it.

Views of nine members—*continued*

(xiii) In conclusion we would say that, while retaining the name "divorce" for proceedings based on the commission of a specified matrimonial offence, we would substitute the term "dissolution of marriage" for proceedings based on the principle of breakdown or frustration of the marriage. In the latter category we would include proceedings taken in respect of the insanity of one of the spouses. We see no justification for speaking of the termination of a marriage for such a cause as a "divorce", with all the implications of intention and culpability which that word connotes.

(2) WIDER PROPOSAL SUPPORTED BY FOUR OF THE NINE MEMBERS

71. (i) Four of us¹¹ consider that it would be desirable to extend the proposal set out in paragraph 70 (viii) and, in certain circumstances, to allow a marriage to be dissolved notwithstanding the objection of one of the spouses, thus going further in providing a way out from marriages which have completely failed in their purpose. Our proposal is:

An application for dissolution of marriage may be made to the court by either spouse on the ground that the spouses have lived separately for a period of not less than seven years immediately preceding the application, and the court shall pronounce a decree dissolving the marriage where this ground is established, provided that, if the other spouse objects to the dissolution, the applicant must first satisfy the court that the separation was in part due to unreasonable conduct of the other spouse.

(ii) The proviso which we suggest puts the conduct of the spouses in issue in appropriate cases and, in our opinion, meets entirely any objection that may reasonably be taken to a marriage being dissolved against the wish of one of the spouses. A spouse may have conscientious grounds against dissolution of marriage, but, if he or she has by unreasonable conduct been at least in part to blame for the separation, it would seem unjust to hold that conscientious scruples should prevail.

(iii) We see no benefit to society, to the individual or to the State in maintaining marriages in name which are no longer, and on all foreseeable estimates will never be, marriages in fact and which secure few or none of the purposes for which marriage was designed. There are many persons living together in illicit unions, which have all the potentialities of happy, permanent marriage, who are unable to marry because of a pre-existing marriage which has completely broken down, and because the "innocent" spouse from spite, religious scruple or some other reason, is not prepared to take proceedings for divorce. We see in many of these illicit unions, which may have endured for years, all those elements of love, comradeship and happiness in children that make the cohesive qualities of a happy marriage.

(iv) Nor is that all. The frustration caused in such cases can lead to consequences detrimental to the individual and, we think, also to the State. We have in mind not only the stigma of illegitimacy that attaches to the children of such unions, with the psychological consequences resulting therefrom, but the effects on the parties directly concerned. First, they are living in an atmosphere of deception, and, if there are children living in the house, that means that sooner or later the children feel that there is something being concealed. Secondly, they are living in fear, and there is nothing more warping to people's lives or development than that they should live in fear, and nothing more injurious to children than that they should grow up

¹¹ Dr. Baird, Mr. Brown, Mrs. Jones-Roberts, Lord Keith of Avonholm.

with the atmosphere of fear around them. Thirdly, there are many such people who long to have children to complete their union, but who refrain from doing so because they do not think it right to bring up children in an atmosphere of lying and fear arising from the fact that their parents cannot be legally married. Fourthly, such people do not feel free to enter into the fullest activities of a citizen; they are unlikely to take part in social work, political work and other ordinary activities. In particular, many of them are religious people, but it may be doubted whether there is any church in the country where two people living in adultery would feel at home, and they will probably fall away from any religious body to which they would like to be attached, and will give little if any religious upbringing to any children they may have in their home. Such views were expressed to us in evidence and are, we think, sound.

(v) A proposal on the lines of that set out in sub-paragraph (i) had support from a large number of organisations and individuals. In some cases it was impossible to speak for bodies representative of professional and like interests owing to the variety of views and convictions of the individual members, but leading members of two such bodies supported such a proposal¹².

(vi) A ground somewhat similar to what we propose has existed in New Zealand since 1921, save that there the separation had to start from an agreement to separate, or to follow on a court order of separation, and in such cases the period of separation required is only three years. There has, however, recently been passed in New Zealand a further enactment making like provision for any separation that has lasted for seven years or more. In both cases there is a proviso that if "the respondent opposes the making of a decree and it is proved to the satisfaction of the court that the separation was due to the wrongful act or conduct of the petitioner the court shall dismiss the petition". In one important respect the proviso under our proposal is more favourable to a respondent than is the proviso under the New Zealand Act. There, an objecting respondent has to prove that the separation was due to the petitioner's wrongful act or conduct to succeed in his objection. In the proviso which we propose, if objection is taken by a respondent, the burden is on the petitioner to prove that the separation was at least partly due to the unreasonable conduct of the respondent.

(vii) With regard to public opinion in New Zealand on this ground and to the experience of its operation, some passages from the evidence of one of the judges of the Supreme Court of New Zealand may be quoted. This evidence was given before the passing of the recent statute mentioned above and so refers to the law as enacted in 1921.

"9380. Can you throw any light upon the reason for the introduction of divorce after three years' separation?—Yes. It had its basis in the exercise of what was good, sound judgment. This proceeded upon the footing that marriage should be permanent; but it then went a step further and brought into the scale the fact that marriages which were marriages in name only were cruel to the individual and against the public interest. After, I imagine, a great deal of thought and a good deal of careful consideration, the conclusion was reached that if a marriage had failed, and the failure had endured for three years, that

¹² The British Medical Association (Minutes of Evidence, Sixth Day) and the Law Society (Paper No. 88, Minutes of Evidence, Twenty-ninth Day).

VIEWS OF FOUR MEMBERS—*continued*

was a firm assurance that it was never likely to be any use as a marriage.

I am not speaking as a lawyer now, much less as a judge, but I remember the discussions there were, and this ground had the approbation of the public conscience at the time. I think it still would command public approbation. When I say 'public' I do not mean any hue and cry ; I mean that it would command the support of men of mature years and sound judgment.

9381. That really was very much in line with other information supplied to us. It was said, for instance, that the legal profession in New Zealand as a whole regarded this ground as both desirable in principle and satisfactory in practice. Would you agree with that?—Yes ; I would agree with that.

9382. It was also said that the ground has the approval of the large majority of the people of New Zealand. Would you agree with that also?—I believe that to be true. I may be prejudiced in that view ; but, after a long lifetime's experience, I am convinced that there should be divorce, and that if a marriage has failed for more than three years and the parties have been apart for so long as three years, they are never likely to come together again."¹³

¹³ See Minutes of Evidence, Fortieth Day (Mr. Justice Finlay).

CHAPTER 3

OTHER SUGGESTED NEW GROUNDS OF DIVORCE

72. We have considered the following suggestions¹ for new grounds of divorce:

- (i) Wilful and persistent refusal of sexual intercourse.
- (ii) Wilful refusal to have a child.
- (iii) Cruelty to a child of either spouse.
- (iv) The commission of a sexual offence against a child of either spouse.
- (v) Lesbianism.
- (vi) Wilful refusal to consummate the marriage.
- (vii) Artificial insemination by a donor without the husband's consent.
- (viii) Detention as a mental defective of dangerous or violent propensities.
- (ix) Incompatibility of temperament.
- (x) Imprisonment.
- (xi) Murder.

73. Of the above, we are recommending that the following should be made grounds of divorce:

- (vi) Wilful refusal to consummate the marriage.
- (vii) Artificial insemination by a donor without the husband's consent.
- (viii) Detention as a mental defective of dangerous or violent propensities.

74. With regard to the first five suggestions, we recognise that such conduct on the part of a spouse may constitute a grave matrimonial wrong and, indeed, may make married life intolerable for the other spouse. As we show below, the existing law (at least in England) goes a long way in providing a remedy (under the grounds of cruelty or constructive desertion), but we appreciate that there may be cases of real hardship for which at present relief is not available. We are, however, recommending (by a majority) that if the conduct of one spouse has been so intolerable as to justify the other spouse in leaving him, the remedy of divorce should be available to the injured spouse after the separation has lasted for at least three years, provided that a *bona fide* offer of amendment has not been unreasonably rejected (see paragraphs 155 and 170). We contemplate that relief would then be available for any cases of hardship, arising out of such conduct as is listed under heads (i) to (v) above, for which the existing law makes no provision. As we explain in Chapter 4, the advantage of our proposal is that ample time is allowed for the ill-doing spouse to express repentance; and sometimes conduct of the type we are now considering is a consequence of some emotional disorder which may be put right by treatment.

75. We now explain why we have rejected or accepted the suggestions listed in paragraph 72 for new grounds of divorce.

(i) Wilful and persistent refusal of sexual intercourse

76. In England, mere refusal of sexual intercourse, whether or not it leads to the separation of husband and wife, is not in itself enough to

¹ Two other new grounds were also suggested to us, namely, habitual drunkenness and intolerable conduct. We deal with these in Chapter 4.

constitute desertion but such refusal may, together with other circumstances, provide evidence from which an intention to desert may be inferred². Thus, when a wife left her husband after his persistent refusal of sexual intercourse, combined with neglect and insults, it was held that he had deserted her³. In Scotland, it had been held that refusal of sexual intercourse in itself amounted to desertion⁴ but this ruling was reversed by the decision of the House of Lords in the case of *Lennie* in 1950⁵. (Some Scottish witnesses suggested that it would be desirable to return to the position as it was before the case of *Lennie*.)

77. Refusal of sexual intercourse is not infrequently an ingredient in cases of cruelty. If intercourse had been refused out of a desire to inflict misery on the other spouse, and that spouse's health had suffered, it might be possible to establish a case of cruelty on such refusal in itself, though no case of that kind has been reported⁶.

78. We recognise that refusal of sexual intercourse, if persisted in without good cause, constitutes a serious breach of marital obligations, but we think that it would not be wise to make such conduct a specific ground of divorce. A variety of physiological and psychological factors are involved, standards of frequency may be introduced and, in an issue depending solely on the intimate life of husband and wife, it would be difficult for the court to test the evidence, so that there would be substantial risk of a false case being imposed on the court. In other words, the ground would be a strong temptation, to less scrupulous spouses, to put forward a false and collusive case as an easy way out of marriage.

79. The suggestion that wilful refusal of sexual intercourse in itself should be deemed to be desertion, although it had not resulted in the separation of husband and wife, is equally open to this objection, as well as to the criticism that it would introduce an element of artificiality into the concept of desertion.

(ii) Wilful refusal to have a child

80. What we have said about the preceding suggestion applies also to the suggestion that wilful refusal to have a child should be made a specific ground of divorce. But in addition there is a very real practical objection, namely, the difficulty of providing a satisfactory definition. We do not think that it would be possible to find one which would not result in hardship and injustice in some cases. If the ground were confined to wilful refusal to have a first child, then a spouse who genuinely felt that it was wrong not to have a second child would be denied relief. Yet if the ground were not thus limited, it would be very difficult to know where the line should be drawn. People have very different views on what is reasonable in size of family and there are some who have conscientious objections to any form of birth control. Similar difficulties would arise over what should constitute "good cause" for refusal to have a child.

81. In England, if one spouse refuses to have a child when the other spouse desires one and his (or her) health suffers in consequence, this may amount to cruelty⁷.

(iii) Cruelty to a child of either spouse

82. In England, it has been held that if a husband is cruel to the children in the presence of his wife and in order to cause her pain, and her health is

² *Weatherley v. Weatherley*, [1947] A.C. 628; *Scotcher v. Scotcher*, [1947] P. 1.

³ *Lawrance v. Lawrance*, [1950] P. 84.

⁴ *Goold v. Goold*, 1927 S.C. 177.

⁵ *Lennie v. Lennie*, 1950 S.C. (H.L.) 1.

⁶ See the observations of Denning L.J. in *Kaslefsky v. Kaslefsky*, [1951] P. 38, at p. 47.

⁷ *Knott v. Knott*, [1955] 3 W.L.R. 162; *Forbes v. Forbes*, [1955] 1 W.L.R. 531.

affected, that may constitute cruelty to the wife⁸. Scots law would seem to be the same⁹. Presumably in both countries relief would be available to a husband in like circumstances.

83. We consider that it would be wrong to allow a spouse to obtain a divorce simply on the ground that the other spouse had been cruel to the children, and without regard to the effect that the behaviour had had on the applicant. The applicant might in fact be indifferent to the cruelty and simply using it as a pretext to obtain a divorce. In suggesting that cruelty to children should be a ground of divorce, most witnesses were, we believe, thinking primarily of the children's interests, but in our view that implies some confusion of thought on what is really in the children's best interests. For the sake of the children, everything possible should be done to persuade the cruel spouse to mend his ways, in the hope that it may not be necessary to break up the home. If persuasion by the other spouse fails, assistance from outside (e.g., from the National Society for the Prevention of Cruelty to Children) may achieve the result of protecting the children and reforming the erring spouse. But if it is really impossible to maintain family life, then we contemplate that the remedy of divorce should ultimately be available, under our proposals in paragraphs 155 and 170. In England, it is also open to the spouse (husband or wife) to apply to a magistrates' court for a separation order on the ground of persistent cruelty to the children; but we should point out that if a separation order had been obtained it would not be possible subsequently to apply for a divorce on the ground of constructive desertion, since the separation order would have put an end to the desertion.

(iv) The commission of a sexual offence against a child of either spouse

84. It is after most anxious consideration that we have rejected the suggestion that conviction of a spouse for a sexual offence against a child should in itself entitle the other spouse to obtain a divorce. There is much force in the argument that, if a man has been convicted of an offence against his own child (or step-child), his wife should be able to divorce him, since, quite apart from her natural disgust at what he has done, she may well be afraid, for the children's sake, to take him back into the home. Nevertheless, we have decided that it would be unwise to make a conviction in itself a ground for divorce. The range of conduct covered would then be very wide; the offender may sometimes be the victim of illness or emotional maladjustment and there is then the possibility that he may be cured by suitable treatment. We consider, however, that an immediate, protective remedy should be available to the wife, if she is apprehensive for the safety of the children, and we are accordingly recommending elsewhere that, in England and Scotland, conviction for a sexual offence against a child should be a ground of application for a separation order (see paragraphs 1029 and 1203).

85. In England, it has been held that the commission of an indecent assault against a child of the marriage or a step-child may amount to cruelty to the wife, if her health suffers in consequence. It is possible that the Scottish court might take the same view¹⁰.

(v) Lesbianism

86. The intention of witnesses who suggested that lesbianism should be a specific ground of divorce was to provide a remedy for a husband in circumstances similar to those in which a wife would have a remedy on the ground of sodomy. Lesbianism is merely a synonym for female homosexuality. In the case of both men and women homosexuality may range

⁸ *Suggate v. Suggate* (1859), 1 S. & T. 489; *Birch v. Birch* (1873), 42 L.J.P. 23.

⁹ See *Duffy v. Duffy*, 1947 S.C. 54.

¹⁰ See the observation of Lord Wheatley in *Brown v. Brown*, 1955 S.L.T. 48.

from feelings of affection which find no physical expression to some physical and emotional equivalent for normal sexual intercourse. Sodomy is a particular physical relationship. It might seem reasonable to put men and women on the same footing by making lesbianism a separate ground of divorce if the existence of a physical relationship analogous to sodomy could be proved. We do not think that this would in practice achieve what the witnesses have in mind. Apart from the difficulty of getting a workable definition, the difficulty of proof would be so much greater than in the case of sodomy as to make the provision of such a remedy virtually worthless. On the other hand, unless the ground were precisely defined, it would be open to a wide and uncertain interpretation and might lead to a divorce being granted against a wife when, in similar circumstances, relief would not be available against a husband practising homosexuality. Accordingly, we do not recommend that lesbianism, however manifested, should be made a separate ground of divorce.

87. In England, unnatural practices with other women persisted in by a wife throughout the marriage (with neglect of her home and child) have been held to amount to cruelty where her husband's health was affected¹¹. In a recent case¹², the court was prepared to go rather further, and to accept as cruelty persistence by a wife, to the detriment of her husband's health, in an intimate relationship with another woman, although there was no proof of unnatural practices.

(vi) Wilful refusal to consummate the marriage

88. Under Section 8 (1) (a) of the Matrimonial Causes Act, 1950, a marriage is voidable on the ground that it has not been consummated by reason of the respondent's wilful refusal to consummate it. There is no corresponding provision in Scots law. We recommend that such wilful refusal should be made a ground of divorce, and not of nullity, in both England and Scotland. We consider that the presentation of a petition on this ground should be made an exception to the restriction, in England, on the presentation of petitions for divorce in the first three years of marriage.

89. Refusal to consummate the marriage may be evidence of impotence in the psychological sense, as for instance, some invincible aversion or repugnance which makes consummation impracticable. Such incapacity presumed to exist at the time of the marriage is a non-statutory ground of nullity in both England and Scotland. Wilful refusal, on the other hand, connotes capacity to consummate the marriage but unwillingness to do so. To make this a statutory ground of nullity suggests some confusion of thought. Nullity should be granted for some defect or incapacity existing at the date of the marriage. Wilful refusal is something that happens after the marriage, and should therefore be a ground of divorce.

(vii) Artificial insemination by a donor without the husband's consent

90. Our terms of reference do not embrace a consideration of the moral and social implications of artificial insemination, but we have felt it right to consider in what, if any, circumstances artificial insemination by a donor should constitute grounds for divorce. In our view, if a wife accepts artificial insemination by a donor without the consent of her husband she is doing him a grave injury, an injury which, in its possible consequences, is as serious as that of adultery. The intention is, and the result may be, to father a child on the husband without his knowledge. It was in fact

¹¹ *Gardner v. Gardner*, [1947] 1 All E.R. 630.

¹² *Spicer v. Spicer*, [1954] 1 W.L.R. 1051.

suggested to us that this conduct should be deemed to be adultery for the purpose of the divorce law, whether or not it can accurately be described as adultery. We think that this would not be desirable. Instead, we recommend that acceptance by a wife of artificial insemination by a donor without the consent of her husband should be made a new and separate ground of divorce.

(viii) Detention as a mental defective of dangerous or violent propensities

91. We think that it would be right to allow divorce to be obtained where a spouse who is a mental defective is detained in an institution because he is of "dangerous or violent propensities" and it is most unlikely that he will ever be released. This constitutes a case of exceptional hardship, analogous to the hardship suffered by a man or woman whose partner has become incurably insane. The objects of the marriage relationship have been just as completely and finally frustrated.

92. Accordingly, we recommend that in England and Scotland either spouse should be able to apply for the dissolution of the marriage on the ground that the other spouse is a mental defective who, by reason of his or her dangerous or violent propensities, has been detained in an institution for mental defectives for a continuous period of at least five years immediately preceding the application, and whose recovery from such violent or dangerous propensities is highly improbable.

93. We have taken a period of five years because we understand that if a patient has not responded to treatment within five years it is most unlikely that he will ever be able to take his place in society again. However, we still consider it desirable, in the interests of the patient, that the court should be satisfied, by medical evidence, that recovery from the dangerous or violent propensities is highly improbable. Arrangements should also be made for the patient to be represented in the proceedings for dissolution of marriage. We suggest that the procedure for such representation, as well as that for bringing evidence of the patient's condition before the court, should be on the same lines as the procedure in proceedings brought on the ground of incurable insanity (see Chapter 4).

94. Apart from this one class, we see no need to make any provision for divorce in respect of mental deficiency. Divorce would be inappropriate where the mental deficiency was known to the other party at the time of the marriage; and if a spouse has married in ignorance of his partner's mental deficiency, under English law the marriage may be annulled if proceedings are brought within twelve months of the marriage. We are recommending that the same provision be made in Scots law (see paragraph 291). In the case of mental defectives of dangerous or violent propensities, however, the remedy of nullity is likely to be barred by the time-limit for taking proceedings, because they are often high-grade defectives who seem to differ very little from the ordinary person until there is an outbreak of violent conduct.

95. From enquiries we have made, it seems unlikely that there would be any substantial number of mental defectives who would come within the scope of the proposed ground. Some mental defectives who have to be admitted to institutions because of their violent conduct can be allowed out after two or three years' detention. Of those who remain, most are not married. But there are some who are, and we think it right that the remedy of divorce should be available to their spouses.

(ix) Incompatibility of temperament

96. To allow divorce to be obtained on the ground of incompatibility of temperament would amount to allowing divorce by consent without any safe-

guards, since (as the Gorell Commission pointed out¹³) it would be quite impossible for any court to distinguish incompatibility from mutual consent. We are therefore all agreed that such a ground should be rejected. Those of us who support the introduction of a new ground of dissolution of marriage, based on seven years' separation of the spouses, consider that relief would then be available for those cases where the incompatibility between husband and wife was so deep-rooted that it had resulted in the complete failure of the marriage.

(x) Imprisonment

97. We have considered whether it would be desirable to provide relief in the following cases:

(1) where a spouse is constantly in and out of prison ;

(2) where a spouse has been sentenced to a long term of imprisonment or preventive detention.

We deal with each in turn.

Imprisonment for an aggregate of several terms

98. We recognise that the position of the wife of a man who is constantly in and out of prison may be very difficult. She may feel the disgrace acutely ; she may have to rely on national assistance each time he goes to prison ; and she may live in dread of his return home because she is fearful of his influence on the children. In the end her life may become intolerable¹⁴.

99. We do not, however, think that it would be right to seek to provide relief by making repeated imprisonment a separate ground of divorce. Anti-social behaviour is not something which in itself strikes at the root of the relationship between husband and wife. A man may be a criminal and yet be a loving husband and a kind and affectionate father. Moreover, a wife's efforts to influence her husband for good may be effective. If divorce were available to a prisoner's wife, she might well abandon such efforts ; or, if she wished in any case to be free of the marriage bond, her husband's imprisonment would afford a convenient and insincere pretext for divorce. It might also be granted to a wife who had at least acquiesced in if not actually encouraged her husband's crimes. Finally, any definition of "repeated imprisonment" is bound to be arbitrary in that it would have to fix the number and length of the terms of imprisonment which would give grounds for divorce, and would bear no relation to the particular circumstances of each case.

100. Those of us who support the proposals set out in paragraphs 155 and 170 rely on them to provide relief for cases of real hardship.

Sentence of a long term of imprisonment or of preventive detention

101. After careful consideration, we have decided that a sentence of a long term of imprisonment should not be made a ground of divorce. In the first place, to allow a man to be divorced in these circumstances would be to add a further penalty to the punishment laid down by the law. Secondly, there is the part which the wife can play in helping the man to reform ; it is generally agreed that the prospect of return to his wife and family may be a decisive factor in a criminal's response to reformatory treatment. Such arguments influenced the Gorell Commission in 1912 in recommending that imprisonment should not be made a ground of divorce and they are just as valid today.

¹³ Cd. 6478, paragraph 324.

¹⁴ Under English law, in certain circumstances repeated imprisonment may be held to amount to cruelty, if the wife's health is affected—see *Woollard v. Woollard*, [1954] 3 W.L.R. 855.

102. We considered whether it might be right to distinguish between a sentence of a long term of imprisonment and a sentence of preventive detention, on the footing that the latter means that a man has persisted in a life of crime to a point where it has been considered desirable that society should be protected from his criminal activities. We concluded that a distinction could not be justified. In imposing a sentence of preventive detention the object is not only to protect society but also to seek to reform the criminal. No prisoner is to be regarded as wholly beyond rehabilitation; and it is just as important that a man's wife should be encouraged to give him support if he has been sentenced to preventive detention as it is if he has been given a long term of imprisonment.

103. Further, such a distinction would in practice necessarily be arbitrary. Not all criminals who at the time of the trial are eligible for preventive detention do in fact receive it; and among those who do not, there are many who have just as bad records and are just as unhopeful characters as those who are serving sentences of preventive detention.

(xi) **Murder**

104. We have considered whether divorce should be available to a spouse if the other spouse has committed murder and the sentence of death has not been carried out or has not been imposed.

105. The Gorell Commission recommended that divorce should be available if the death sentence were commuted to imprisonment for life. The ground set out above is wider in that it would allow a divorce to be obtained if a man or woman had been found by a jury to have committed the killing but to have been insane at the time, or had been certified as insane when in prison under sentence of death¹⁵. But divorce would not be available if a spouse had not stood his trial for murder, because he had been removed to a mental hospital or institution before trial, or because he had been found by the court of trial to be unfit to plead, by reason of his insanity; that is to say, divorce would be available only if the prisoner had been tried and found by a jury to have committed the act.

106. In support of making murder a ground of divorce, it may be argued that it is asking too much of human nature to say that a man or a woman should be expected to live with a spouse who has committed a murder. It is said that if a spouse feels that the essential content of the marriage has been destroyed by the act of murder, it is right that he or she should be able to have the marriage dissolved and that this is justified by the very nature of the deed.

107. Viewed in this way, there is no good reason for making a distinction between the sane and the insane killer. The situation of the other spouse is the same in each case. It is of course true that if the insane spouse is detained for longer than five years, relief may be available on the ground of insanity, but it may not be possible to establish that the patient is incurably of unsound mind even in those cases where it is unlikely that he will ever be released.

108. While a case can be made out for murder as a ground of divorce, on the justification of exceptional hardship, there are, on the other hand, weighty arguments against this proposal. In the first place, there is the argument that it would be wrong in principle to allow a man or woman to be divorced simply on the fact that he or she had been convicted of murder, because murder as a crime cannot be regarded in isolation and apart from the background of the individual case. Where the death sentence has been commuted to life imprisonment there will as a rule have been extenuating

¹⁵ It would also include (i) all person under the age of eighteen years at the time of the murder, and (ii) a woman who is pregnant at the time of her conviction.

circumstances. Moreover, "life imprisonment" does not in practice mean "imprisonment for life". The prisoner may be released within a few years; in the majority of cases he will not be kept in prison for more than eight or nine years¹⁶. It is then important that he should be encouraged to re-establish himself as a useful member of society; and experience has shown that murderers are by no means incapable of reformation. It is therefore not unreasonable to expect the other spouse to maintain the marriage and be ready to help the prisoner on his return; indeed, often his spouse does stand by him and it is important that nothing should be done to weaken that spouse's resolution.

109. There are special arguments against allowing divorce of a man who was insane when he killed. A man cannot be said to have been guilty of murder if he was so insane as not to have been responsible for what he did. The law recognises this, since in Scotland in such circumstances he would be acquitted on the ground of insanity and in England the special verdict commonly referred to as a verdict of "guilty but insane" has been held by the House of Lords to be a verdict of acquittal against which no appeal lies¹⁷. To allow such a man to be divorced would be to punish him for something outside his control, and to deprive him of the support which may make all the difference to his prospects of recovery. Sometimes it may not be necessary to detain the insane person for very long. If a woman, for instance, in circumstances not amounting to infanticide, has killed her child in a state of acute depression due to worry and ill-health, she may respond quite quickly to rest and treatment, and it is only right that her husband should be ready to take her back on her release. For appropriate cases, on the other hand, the remedy of divorce on the ground of incurable insanity would be available in due course.

110. There is also the consideration that such a ground of divorce would necessarily be to some extent arbitrary in its provision of relief for the spouse of a man or woman who had in fact killed. In the period 1946-1953 in England and Wales 133 persons charged with murder were found to be "insane on arraignment" (i.e., unfit to plead), as compared with 116 persons found to be "guilty but insane"; yet in the former case it is usually beyond doubt that the person charged has in fact done the killing. Moreover, since the criterion of unfitness to plead cannot be precisely defined, there must always be an element of uncertainty whether in any particular case the person will be found "insane on arraignment" or "guilty but insane"¹⁸.

111. With regard to Scotland, the proportion of prisoners found unfit to plead is very much higher than in England; indeed, the verdict of "insane at the time of the offence" is not often given. The corresponding figures to those given for England and Wales in the preceding paragraph are 21

¹⁶ Of 93 "commuted death sentence" prisoners in England and Wales who were released over the period 1940-1949, 26 had served 5 years or less and 52 had served more than 5 but less than 10 years. The remaining 15 had all been released by the end of 14 years. (Source: Report of the Royal Commission on Capital Punishment, Appendix 3, Table 12 (Cmd. 8932).)

¹⁷ *Felstead v. R.*, [1914] A.C. 534.

¹⁸ The Report of the Royal Commission on Capital Punishment (paragraph 220) states:

"There has been a steady and substantial rise during this period [1900-1949] in the number of persons found insane on arraignment, both absolutely and relatively to the number found guilty but insane. Although one witness was inclined to attribute this rise to an increase in insanity rather than to greater leniency on the part of juries, we think it probable that it is mainly due to a change in the attitude of medical witnesses, especially of prison medical officers, and its acceptance by the courts. The criterion of unfitness to plead has been widened and the test is now much less stringent than it was 50 years ago or even more recently."

and 3. The Report of the Royal Commission on Capital Punishment observes that "it seems clear that, even though the criterion of unfitness to plead may be in theory the same as in England, it is in practice much less strictly applied"¹⁹. If this is so, then the suggested ground of divorce would in practice be of wider application in England than in Scotland, since some persons who in England would be found "guilty but insane" would in Scotland be found unfit to plead. Moreover, there is a further respect in which the ground would in practice have a wider application in England than in Scotland. It is possible in Scotland for a person charged with murder to raise the defence of "diminished responsibility" if, though not insane, he is suffering from mental weakness or abnormality. If this defence is successful, the crime is reduced from murder to culpable homicide (the equivalent of manslaughter in England), for which a sentence of imprisonment is imposed (either for life or for a specific term). Such a case would not of course come within the provisions of the suggested ground of divorce. On the other hand, since the doctrine of diminished responsibility is not recognised in English law, in similar circumstances in England there would normally be a conviction for murder but the death sentence would most probably be subsequently commuted to life imprisonment. If this happened, divorce would then be available to the other spouse under the suggested ground.

112. We have not found this an easy matter to decide, but after carefully weighing the arguments and the evidence, we do not recommend that murder should be a ground of divorce.

¹⁹ Cmd, 8932, paragraph 254.

CHAPTER 4

SUGGESTED ALTERATIONS OF THE PRESENT GROUNDS OF DIVORCE

113. We now deal with the existing grounds of divorce in England and Scotland and with suggestions for their alteration. In all but one instance we have been able to discuss at one and the same time the laws of both countries. With desertion we have found it more convenient to discuss the law of each country separately.

ADULTERY: ENGLAND AND SCOTLAND

114. The commission of adultery by one spouse is almost universally recognised as entitling the other spouse to ask that the marriage tie be dissolved. In England adultery was a ground of divorce long before the Matrimonial Causes Act, 1857, conferred matrimonial jurisdiction on the civil courts, although divorce could only be obtained by the cumbersome and expensive process of a Private Act of Parliament¹. In Scotland it has been a ground of divorce since the Reformation.

Single act of adultery

115. Some English witnesses suggested that the law should be modified in respect of proceedings based on the commission of a single act of adultery. There were two proposals, namely, that relief should be denied entirely or that the court should have a discretion to delay granting relief so that the possibilities of reconciliation might be explored. It was said in support that a single act of adultery need not necessarily denote that the marriage has completely failed and should be dissolved; often, on learning of the adultery, the injured spouse may take proceedings in a fit of anger or pique or because he or she has been influenced by the advice of relatives and friends. If relief were to be refused or delayed, husband and wife would have time to try to resolve any underlying difficulties and might well come together again.

116. We have considered possible ways in which the law could be altered on one or other of the lines proposed. One course would be to say that divorce should be granted only on proof of an adulterous association. That, in our view, would amount to substituting a new ground of divorce for that of adultery. As one witness put it²: "The offence is adultery and as far as the offence is concerned it does not make any difference whether it is a course of conduct or an isolated act". Moreover, no relief would then be available, as in our opinion it should, to the person whose spouse has committed promiscuous acts of adultery.

117. Another course would be to say that only repeated acts of adultery should give ground for divorce. To this there is the practical objection that to obtain evidence of repeated acts of adultery might be very expensive, and sometimes impossible, if a spouse were particularly adept at concealing his adultery. But the real difficulty lies in deciding what should constitute "repeated acts of adultery". Could it be said of two acts of adultery separated by an interval of, say, five years that the element of repetition was present? Faced with this problem, the court might be led to set up a

¹ A divorce could be obtained by a wife in this way only where the adultery of the husband was aggravated by the commission of other matrimonial offences.

² Q. 3730, Minutes of Evidence, Seventeenth Day (The General Council of the Bar).

test under which, say, three acts of adultery within a reasonable period would constitute "repeated acts". The dividing line would be most arbitrary and we feel that no distinction can properly be made between the first and any other act of adultery. Every such act is inimical to the marriage relationship, and the adoption of any dividing line might lead to the view that a spouse could commit one or two acts of adultery with impunity. The position of the injured spouse must also be considered; he may feel that it would be impossible to resume life with his adulterous spouse after the commission of one act of adultery, particularly when a child is born as a result.

118. There remains the alternative suggestion that the court should have a discretion to delay granting a decree of divorce when the sole ground put forward is the commission of a single act of adultery. It would be difficult for the court to decide in what circumstances relief should be delayed; as we have said, as a matrimonial offence one act of adultery cannot properly be distinguished from another. Moreover, we do not think that the proposal would achieve its object of promoting reconciliation. Apart from the fact that at this final stage, when the case has been tried and the adultery proved, the prospects of a successful reconciliation must be very slight, we are satisfied (see paragraph 340) that the element of compulsion should not be introduced into any machinery designed to bring about reconciliation.

119. In our view, and this was confirmed by several witnesses, the commission of an isolated act of adultery, where otherwise the marriage relationship is comparatively stable, is more often than not forgiven. We consider it preferable that the injured spouse should be left, as at present, with the choice of deciding whether to forgive the commission of a single act of adultery or to found divorce proceedings upon such conduct. We accordingly recommend that there should be no alteration in the law relating to adultery as a ground of divorce in England and Scotland.

CRUELTY: ENGLAND AND SCOTLAND

THE PRESENT POSITION

120. Cruelty was made a ground of divorce in England by the Matrimonial Causes Act, 1937, and in Scotland by the Divorce (Scotland) Act, 1938. It was not at that time, however, a concept novel to the law of either country. In England it had been a ground of divorce on the petition of a wife when coupled with adultery and in Scotland it was a defence to an action of adherence, whilst in both countries it was a ground for obtaining a judicial separation. The provisions of the statutes which make cruelty a ground of divorce in England and Scotland, respectively, are differently worded, but it has been explained in a recent judgment of the House of Lords³ that in spite of this difference in wording, there is no difference in the principles upon which relief should be given for cruelty in the two countries.

121. Cruelty has never been defined by statute. The courts have frequently had to consider the question, however, and there is a long line of judgments as to the circumstances in which cruel conduct will afford grounds for matrimonial relief, although, hitherto, the courts have refused to give a comprehensive definition, preferring that the concept of legal cruelty should be left to development by means of judicial decision so as to accord with changing social conditions. These decisions have established, however, that

³ *Jamieson v. Jamieson*, [1952] A.C. 525; 1952 S.C. (H.L.) 44.

certain requirements must be met before the court can be satisfied that there has been cruelty sufficient to justify a decree of divorce.

Injury to health

122. Injury or threatened injury to the health of a spouse is one of these requirements. The position was very fully reviewed in 1897 by the House of Lords in the case of *Russell*⁴. Five of their Lordships approved a definition given in the same case when it came before the Court of Appeal to the effect that: "There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty"⁵. Four took the view that this definition was too restricted and that the proposition put forward in an earlier case⁶ that "the causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged" was not confined solely to cases where there was danger or threatened danger to life, limb or health but would admit of a divorce being granted for other grave and weighty causes, provided that the court proceeded with great caution in allowing relief. The majority view has since governed the development of the concept of legal cruelty.

Intention

123. Another requirement relates to the element of intention. In laying down the extent to which the conduct complained of must have been intentional, the court has been concerned that it should not open the door to the possibility of divorce being granted for incompatibility of temperament. It has been said, "Mere conduct which causes injury to health is not enough. A man takes the woman for his wife for better, for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think he establishes cruelty merely because he finds life with her is impossible"⁷.

124. From an early date it has been recognised that motive is not an essential element in legal cruelty⁸. Proof of intent to injure is an important consideration, but the courts are ready to apply the principle that a person may be presumed to intend the natural and probable consequences of his or her acts⁹. Recently, the Court of Appeal in England has said that, although intent to injure "is not an essential element of cruelty . . . , nevertheless intention is an element in this sense, that there must be conduct which is, in some way, aimed by one person at the other"¹⁰. In support of this test, attention has been drawn to the wording of the English statute and it has been said that the phrase "has treated the petitioner with cruelty" imports that the conduct must be "aimed at" the petitioner. It has been explained that conduct which is "aimed at" a spouse consists of actions or words (i) which are actually or physically directed at that spouse, or (ii) which, though not actually or physically directed at that spouse, are done

⁴ *Russell v. Russell*, [1897] A.C. 395.

⁵ *Russell v. Russell*, [1895] P. 315, at p. 322.

⁶ *Evans v. Evans* (1790), 1 Hag. Con. 35, at p. 37.

⁷ *Horton v. Horton*, [1940] P. 187. In this case, it was suggested that to constitute legal cruelty the conduct must consist of wilful and unjustifiable acts causing pain and misery to the spouse at whom they were directed and injury or the apprehension of injury to his or her health. The House of Lords subsequently explained that the conduct complained of must be unjustifiable in the sense that it has not been provoked by the conduct of the other spouse, or, if provoked, that it goes beyond the bounds of conduct which is excusable in the circumstances (*King v. King*, [1953] A.C. 124).

⁸ *Holden v. Holden* (1810), 1 Hag. Con. 453.

⁹ See *Squire v. Squire*, [1949] P. 51.

¹⁰ *Westall v. Westall* (1949), 65 T.L.R. 337.

or said with intent to injure him or to inflict misery on him¹¹. Conduct coming within the first category need not be accompanied by an intent to injure and will include nagging¹², sulking¹³, and excessive demands by one spouse on the time and attention of the other¹⁴. The second category may include such conduct as, for instance, arises from an addiction to drink, gambling or crime. Conduct of that sort, which clearly results from a defect of temperament, will not be regarded as legal cruelty unless an intent to injure is proved to exist. If, however, it is shown that the spouse knew the consequences which would result from a persistence in his conduct but nevertheless continued in it, heedless of the effect on the other spouse, the court may presume the existence of an intent to injure that other spouse or to inflict misery on him. Since this test was laid down, the court in England has shown itself ready to draw this presumption in a number of instances¹⁵. Moreover, the very nature of the conduct may be such as to lead the court to hold that the respondent must have known the effect which it would have on the other spouse¹⁶.

125. With regard to the position in Scotland, the House of Lords has expressly repudiated the suggestion that there has been a divergence in principle between the law of Scotland and that of England as regards the kind or degree of cruelty necessary for divorce¹⁷. It is not inconsistent with that conclusion, however, to say that there may not be strict uniformity between the views of Scottish and English judges on what constitutes legal cruelty. With regard to that type of conduct commonly called mental cruelty, it has been said that "the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim"¹⁸.

Protection—vested right to divorce

126. When a judicial separation was the only remedy available to a spouse who had been treated with cruelty, it was always open to the other spouse to allege that the need for protection from the possibility of future injury no longer existed. If the court was satisfied that that was indeed so (and once the past cruelty had been proved there would have to be very strong evidence to satisfy the court that there was no likelihood of future ill-treatment), it would withhold its decree. In England, however, the Court of Appeal took the view that a decree of divorce on the ground of cruelty should be based on past behaviour and that it was not necessary to have regard to whether there was a reasonable apprehension of further ill-treatment¹⁹. This decision has now been strongly criticised by the House

¹¹ As explained in *Kaslefsky v. Kaslefsky*, [1951] P. 38.

¹² *Usmar v. Usmar*, [1949] P. 1.

¹³ *Lauder v. Lauder*, [1949] P. 277.

¹⁴ *Squire v. Squire*, [1949] P. 51.

¹⁵ *Woollard v. Woollard*, [1954] 3 W.L.R. 855 (husband continuing criminal activities in spite of wife's remonstrances); *Cooper v. Cooper*, [1954] 3 W.L.R. 867 (indecent assault by husband on child of the marriage); *Ivens v. Ivens*, [1954] 3 W.L.R. 887 (indecent assaults by husband on step-daughter); *Knott v. Knott*, [1955] 3 W.L.R. 162 (refusal of husband to allow wife to have child, coupled with practice of *coitus interruptus*); *Forbes v. Forbes*, [1955] 1 W.L.R. 531 (refusal of wife to allow conception of child); *Carpenter v. Carpenter*, [1955] 1 W.L.R. 669 (deception of wife aggravated by subsequent conduct); *Baker v. Baker*, (1955), 105 L.J. 426, 554 (persistent drunkenness). In *Eastland v. Eastland*, [1954] P. 403, however, the court refused to accept that the failure of the husband to provide for the wife and his general irresponsibility and shiftlessness were sufficient upon which to presume an intention to injure her.

¹⁶ *Cooper v. Cooper*, [1954] 3 W.L.R. 867.

¹⁷ *Jamieson v. Jamieson*, [1952] A.C. 525; 1952 S.C. (H.L.) 44.

¹⁸ *Jamieson v. Jamieson*, 1951 S.C. 286, at p. 294. See also *Pinder v. Pinder*, 1954 S.L.T. (Sh. Ct.) 15; *More v. More*, 1955, 71 Sh. Ct. Rep. 60.

¹⁹ *Meacher v. Meacher*, [1946] P. 216.

of Lords²⁰, which considers that the legal conception of cruelty has remained the same for judicial separation and divorce. Legal cruelty, it is said, comprises "two distinct elements: first, the ill-treatment complained of, and secondly, the resultant danger or the apprehension thereof". This is also the view which has been taken by the Scottish court²¹.

VIEWS OF THE WITNESSES

127. Many of the witnesses said that the law relating to cruelty as a ground of divorce worked unfairly and that the result of the requirements laid down in the course of judicial development was to exclude relief from a number of deserving cases. Opinions differed, however, on the extent to which these requirements should be abandoned. Thus, it was said that whenever intolerable conduct by one spouse has caused, or is likely to cause, injury to the health of the other spouse, such conduct should constitute legal cruelty, whether or not the conduct is "aimed at" the other spouse. Some witnesses considered that it should no longer be necessary to prove danger to life, limb or health in order to establish legal cruelty. Other witnesses wished to dispense with both requirements. In support of an alteration in the law on the lines indicated, a number of definitions of cruelty were put forward. They took varying forms but the principle which emerged was that divorce should be granted on the ground of cruelty, to provide immediate relief where the continuance of normal married life has become impossible for one spouse owing to the intolerable conduct of the other spouse. One of the Scottish witnesses went further by suggesting that, to avoid a position where the court may be forced to interpret the concepts of cruelty and desertion in an artificial manner in order to afford relief to deserving cases, a new ground based on intolerable conduct should be introduced.

128. The types of conduct which the witnesses contemplated would provide ground for relief under their proposals included the following:

- (i) habitual drunkenness or drug-taking;
- (ii) cruelty to the children of either spouse;
- (iii) sexual offences against young children;
- (iv) gross indecency between males;
- (v) lesbianism;
- (vi) repeated imprisonment;
- (vii) abnormal behaviour by reason of mental defect;
- (viii) substantial and chronic gambling;
- (ix) wilful and persistent refusal of sexual intercourse.

VIEWS OF THE COMMISSION

129. We consider that the present law with regard to cruelty as a ground for divorce does not require any material change (subject, however, to what we say in paragraph 132). A spouse should be able to obtain an immediate divorce only if the intolerable conduct of the other spouse has been such

²⁰ *Jamieson v. Jamieson*, [1952] A.C. 525; 1952 S.C. (H.L.) 44.

²¹ See *M'Donald v. M'Donald*, 1939 S.C. 173. In *Dunlop v. Dunlop*, 1950 S.C. 227, the wife was unable to obtain relief on the ground of habitual drunkenness (which under Scots law is to be regarded as the equivalent of cruelty) because the defender satisfied the majority of the court that he had reformed and that the pursuer would be in no danger if the parties came together again.

that the present legal requirements of cruelty in respect of injury to health and intention are satisfied²². These are valuable safeguards, the removal of which would in our view lead to divorce on the ground of incompatibility of temperament.

130. The test of injury or threatened injury to health has been applied for a great number of years and, in our opinion, the fact that during that time social conditions have changed considerably has not altered its soundness. It is said by those who wish to dispense with the test that it operates unfairly against the person, who, being robust both in mind and body, is able to withstand ill-treatment, but nevertheless finds married life intolerable by reason of the pain and misery caused by the other spouse's conduct. Yet his weaker neighbour may obtain relief in respect of exactly the same kind of ill-treatment. We do not accept this criticism. Cruel conduct, as we see it, must be judged with reference to the person affected by it. If, as an alternative, it were sought to fix some objective standard, such as that of conduct which no reasonable man should be expected to endure, injustice would be done where conduct did not measure up to the standard set and yet was serious enough to injure the health of a person of delicate physique or susceptible temperament.

131. The test of intention has been criticised on the ground that it results in some cases in the denial of relief to a spouse who has every reason to complain that the behaviour of the other spouse has made it impossible to continue with the married life. But it is material to note that the criticisms of those who wanted to abolish the test of conduct "aimed at" a spouse were made to us nearly four years ago. Since then, the law in this respect has developed, particularly in England, and it would appear that the criticism has largely been met (see paragraph 124 and footnote¹⁵).

132. In one respect, however, we consider that the law requires modification. Conduct which has been such as to constitute cruelty is likely to have destroyed any affection which the injured spouse had for the other. Where the injured spouse has lost all affection, or is still apprehensive of injury to health and feels unable to go on with the marriage, we consider that the remedy of divorce should not be denied to him. Accordingly we recommend that in proceedings for divorce founded on cruelty it should not be necessary for the applicant to prove that he or she needs protection and that proof of past cruelty should in itself confer a right to divorce^{22a}.

133. It was suggested to us that cruelty should be defined by statute. We consider that it is preferable not to have a detailed definition but to allow the concept of cruelty to remain open to such adjustment as it is desirable to make through the medium of judicial decision. We recommend, however, that the same form of wording be used in the statutes making cruelty a ground of divorce in England and Scotland, respectively.

134. We wish to emphasise that, in our view, relief on the ground of cruelty should not be easy to obtain and the remedy of divorce should be given only in respect of conduct which is really of a grave and weighty nature. It should not be possible to obtain a divorce merely because husband and wife find their temperaments unsuited to each other. We recognise that there may be grave and weighty conduct which, while not amounting to legal cruelty, is yet so intolerable as to make the continuance of normal married life impossible. In these cases, however, we consider that a remedy should not be available until a sufficient time has elapsed to allow the ill-doing spouse full opportunity to mend his ways. In England, such

²² This must be read subject to our recommendation with regard to insanity as a defence to a charge of cruelty (see paragraph 256).

^{22a} We do not intend this recommendation to apply to cruelty as a ground of judicial separation (see paragraphs 313—314).

a remedy is to a large extent provided by the existing law on constructive desertion, but we recognise that there are cases of hardship for which relief cannot at present be obtained. In Scotland, where the doctrine of constructive desertion has not been adopted, the cases where no remedy is at present available may be more numerous. The majority of us are making recommendations for England and Scotland designed to provide relief for these cases (see paragraphs 155 and 170).

Habitual drunkenness

135. Section 73 of the Licensing (Scotland) Act, 1903, provides that where it is established in a consistorial action that a husband or wife is a habitual drunkard, the court is to treat that fact as having the same legal consequences and effects as cruelty or bodily violence by the habitual drunkard towards his or her spouse. A habitual drunkard is defined by Section 3 of the Habitual Drunkards Act, 1879, as "a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, . . . at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs". In Scotland, therefore, habitual drunkenness as so defined, in effect, is in itself a ground of divorce at the present time. This is not so in England (although the statutory definition is material in as much as habitual drunkenness is a ground upon which a magistrates' court may make a separation or maintenance order). We do not consider that any advantage would be gained if habitual drunkenness as defined by the statute were to be deemed to be cruelty in England. We think that hardship can be sufficiently relieved under the law relating to cruelty and desertion as grounds of divorce. On the other hand, we see no reason for altering the existing law in Scotland, under which habitual drunkenness, as defined by the Act of 1879, is a ground of divorce.

136. In relation to the magistrates' courts in England, we are recommending that the definition of "habitual drunkard" be amended by including the person who by reason of habitual intemperate drinking renders life intolerable to his or her spouse (see paragraph 1028). We consider it unnecessary that this proposed extension of the definition should apply to Scotland.

DESERTION: ENGLAND

137. Desertion first became a ground of divorce in 1938, although it had originally been one of the offences which when coupled with adultery would enable a wife to obtain a divorce. Since 1857 it has also been possible for either spouse to obtain a decree of judicial separation on the ground of desertion. The present law is contained in the Matrimonial Causes Act, 1950, Section 1 (1) of which provides that a petition for divorce may be presented on the ground that "the respondent . . . has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition".

Length of the period of desertion

138. Most witnesses were content that the period for which desertion must run should remain at three years. No witness suggested that the period of continuous desertion should be lengthened but there were several proposals that it should be shortened, on the ground that it is a hardship for a deserted spouse to have to wait for three years and that there is little prospect of a husband and wife coming together after, say, twelve months have elapsed from the initial desertion. We are all of the opinion that it would

be most undesirable that the period during which desertion must run should be less than three years.

139. Five of us²³ are doubtful whether on balance the introduction of desertion as a ground of divorce in England has been a benefit to the community. We have noted that in recent years the number of petitions on the ground of desertion has amounted to nearly half the total number of divorce petitions presented. To us this suggests that this ground may often provide an easy way out for those who fail to take their marital responsibilities seriously and to show a proper spirit of give and take in married life. We appreciate, however, that if this ground were abolished there would be many genuine cases of hardship for which no relief would be available and that a number of persons would either commit, or pretend to commit, adultery in order to obtain a divorce. Accordingly, we are in agreement with the majority that desertion should remain a ground of divorce.

Continuity of the period of desertion

140. Desertion is ended by a resumption of cohabitation and desertion so ended cannot be revived by subsequent desertion, since the period must be continuous to constitute a ground of divorce.

141. It has been said that "a resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bi-lateral intention on the part of both spouses so to do"²⁴. It follows, therefore, that where husband and wife come together, for whatever period of time and whether or not acts of sexual intercourse take place, the desertion will not be ended unless it can be shown that they have ceased to live apart by reason of a common intention to set up a matrimonial home together²⁵. The fact that husband and wife have had sexual relations will be an important factor in deciding whether there was an actual resumption of cohabitation²⁶.

142. Many of our witnesses said that the present law considerably hampers attempts at reconciliation, since a deserted spouse is in a difficult position when the possibility of reconciliation arises.

143. First, there is the spouse who wishes to take a positive step towards reconciliation by inviting the deserting spouse to resume married life. He may feel that, if this attempt fails, he will wish to divorce the deserting spouse. The desertion may have lasted for, say, two or even three or more years but he knows that a resumption of cohabitation will bring that desertion to an end. If husband and wife had come together in a genuine attempt on both sides to achieve a reconciliation, but the attempt had failed after a few days or weeks, it would be very difficult for the court to come to any conclusion other than that there had been a resumption of cohabitation sufficient to interrupt the continuity of the desertion. The deserted spouse would then have to wait the full period of three years from the failure of the attempt at reconciliation before he could obtain a divorce. The result is that on being advised by his solicitor of the present law, a spouse may well be deterred from attempting a reconciliation unless it is very likely that it will succeed.

²³ Lord Morton of Henryton, Sir Frederick Burrows, Mr. Lawrence, Mr. Mace, Lord Walker.

²⁴ *Mummary v. Mummary*, [1942] P. 107.

²⁵ *Perry v. Perry*, [1952] P. 203.

²⁶ Acts of sexual intercourse between husband and wife raise a presumption of condonation of previous adultery or cruelty (conclusive as against the husband). There was some doubt at one time whether the concept of condonation was applicable to desertion but it has now been held (in *Perry v. Perry*) that this is not so.

144. Secondly, there is the deserted spouse who receives an offer from the deserting spouse to resume married life. The nature of the matrimonial offence of desertion is such that a deserted spouse must be ready, at all times up to the start of divorce proceedings, to affirm the marriage by taking back the other spouse if the latter makes a *bona fide* offer to return and it is reasonable that the offer should be accepted²⁷. If the deserted spouse accepts the offer without making sure that it is genuine, being anxious only that married life should be resumed, exactly the same difficulty arises if the attempt at reconciliation fails. It is true that it may be possible for the deserted spouse to prove that the offer was not genuine and that consequently there was not a common intention to set up the matrimonial home again; if he succeeds in proving this, the period of desertion will be deemed not to have been broken by the attempt at reconciliation²⁸. However, it may be extremely difficult for the deserted spouse to prove this absence of intention on the part of the other spouse.

145. Then there is the problem of what may be called "intermittent desertion", i.e., where a man (say) cannot settle down to married life and deserts his wife from time to time but each time returns home well within the statutory period of three years' desertion.

146. The proposal which received the most support from our witnesses would not only make the position of the deserted spouse less difficult, and thus improve the chances of reconciliation, but would also provide some measure of relief for intermittent desertion. The proposal was that there should be a new statutory ground of divorce under which it would be sufficient to prove that one spouse had deserted the other spouse for periods amounting in the aggregate to three years or more, over a period of five years immediately preceding the presentation of the petition, provided that the respondent was in desertion at the time the proceedings were started and had been in desertion for a continuous period of at least one year.

147. We recognise that under the present law a deserted spouse is in a difficult position when considering whether to ask the other spouse to return to married life or whether to accept an offer on his part to return. We are not able, however, to accept this proposal. It would mean that the spouses, having come together after a period of desertion for, say, two years, might thereafter live quite happily together for up to two years and then, the spouse previously in desertion having again deserted the other for one year, the deserted spouse would be able to obtain a divorce. This we consider to be an entirely new concept of the matrimonial offence of desertion and one which certainly was not in the contemplation of Parliament in 1937 when divorce was allowed for a period of three years' continuous desertion. In effect, the proposal would allow a divorce to be granted for one year's desertion. In our opinion, this would provide too easy an opportunity of discarding the responsibilities of marriage. Moreover, we do not think that it would be safe to assume that there was no likelihood of a subsequent reconciliation if desertion had lasted for one year only. This argument in our opinion applies with even more force to the case of intermittent desertion. So long as the deserting spouse continues to return to the home the possibility of a lasting reconciliation must remain.

²⁷ Justification for refusing an offer may exist, for instance, if the deserting spouse has committed adultery which has not been condoned, or is reasonably suspected of having committed adultery, or, in the case of constructive desertion, has been guilty of conduct of such a nature that the deserted spouse could not be expected to risk a resumption of married life (*Edwards v. Edwards*, [1948] P. 268).

²⁸ See *Perry v. Perry*, [1952] P. 203.

148. Another proposal was that a resumption of cohabitation should be deemed not to have interrupted the continuance of the desertion unless, in the opinion of the court, it amounted to a reconciliation. We find it hard to imagine, however, in what circumstances a resumption of cohabitation, as described in paragraph 141, would not amount to a reconciliation and therefore put an end to desertion. Moreover, a resumption of cohabitation amounting to a genuine reconciliation might last for only a few days and under this proposal the deserted spouse would then be left to wait three years for a remedy.

Views of fourteen members

149. (i) Fourteen of us²⁹ consider that encouragement should in some way be given to husband and wife to come together for a short period in order to find out whether a lasting reconciliation is possible, and that to do this some measure of relief must be provided for a spouse who with the best intentions has sought to resume married life but has again been disappointed. We are of the opinion, however, that only one opportunity should be given for husband and wife to come together and that the period should not last longer than one month. Accordingly, we recommend that, in addition to the present statutory ground of divorce for three years' continuous desertion provision should be made that two periods of desertion which together amount to at least three years, within a period of three years and one month immediately before the commencement of proceedings, should constitute a ground of divorce.

(ii) We recognise that this proposal may be thought to introduce an arbitrary distinction into the law in as much as in some cases the attempt at reconciliation may break down shortly after a month has elapsed, and the deserted spouse is then faced with the same hardship which arises under the present law. We consider, however, that one month affords a sufficient opportunity for husband and wife to see whether they can settle down together again. If cohabitation continues for a longer period, then complete resumption of the *consortium* should be presumed.

(iii) The proposal will ensure that husband and wife may make one attempt at a reconciliation without prejudicing the right of the deserted spouse to take proceedings for divorce. In this connection we appreciate that, at present, a deserting spouse may hesitate to make an offer to return if the subsequent failure on his part to continue the married life may delay the prospect of being divorced for his desertion. This is of course not a hardship for which relief should properly be given but it does mean that at present an overture which might in fact result in a lasting reconciliation may not be made. We considered whether the birth of a child conceived during the trial period of coming together should make any difference but decided that this should not be taken into account.

Views of five members

150. (i) Five of us³⁰, while sympathising with those spouses who face the difficulties referred to in paragraphs 143-145, and in no way wishing to discourage any possibility likely to promote a greater measure of reconciliation, find ourselves unable to support the recommendation made in paragraph 149.

²⁹ Mr. Beloe, Mrs. Brace, Lady Bragg, Sir Russell Brain, Mr. Brown, Mr. Flecker, Mrs. Jones-Roberts, Lord Keith of Avonholm, Mr. Mace, Mr. Maddocks, Mr. Justice Pearce, Lady Portal, Lord Walker, Mr. Young.

³⁰ Lord Morton of Henryton, Mrs. Allen, Dr. Baird, Sir Frederick Burrows, Mr. Lawrence.

We would first emphasise that this proposal would introduce a new ground of divorce for desertion which would be quite different from the existing ground approved by Parliament in 1937. The proposal permits of a return to cohabitation for a period of up to one month during a period of three years and one month. The return may take place early or late in this period and will be accompanied in many, if not most, cases by acts of intercourse, which may result in the birth of a child. In our view a return to cohabitation in those circumstances ought to be regarded as ending the prior desertion for all time, a result which, we think, accords with the natural and general view of the effect of cohabitation. It follows, therefore, that the proposal is open to the same objection as that already mentioned in paragraph 147 in relation to the proposal put forward by the majority of witnesses, namely, that it would allow a divorce to be granted for a period of desertion less than three years, which in an extreme case might be only a few days.

(ii) Moreover, we consider that it is vital to bear in mind the distinction between the matrimonial offence of desertion and separation by consent. Although the spouses may have ceased to cohabit on the first occasion owing to the desertion of one spouse by the other, a fact which can be proved to the satisfaction of the court, we think that there would be a substantial danger that the second parting might not be invested with the same character of desertion but might well contain a strong element of consent. There would then arise an almost irresistible temptation to the parties to attempt to deceive the court in order to obtain a divorce, and it might be difficult for the court to detect the deception.

(iii) Further, we doubt if the results of the proposal would necessarily be what are expected of it. Once a genuine offer to return has been made by the deserter and accepted by the deserted, the latter has no option but to continue the cohabitation except at the price of himself becoming a deserter. So it is the deserting spouse on whom would fall the responsibility of making the decision whether or not to remain beyond a month. If it is hard under the existing law for him or her to make the decision to return, it does not necessarily follow that as the days of the month pass the decision whether or not to remain beyond its end will be any easier. The realisation that, if continued beyond a given and rapidly approaching date, the provisional character of the cohabitation will cease, may well make the ultimate decision more agonising. Thus so far as the deserter is concerned, the proposal does not avoid, it merely postpones, the necessity of a decision. The growth of a true reconciliation is often delicate and precarious: it requires spontaneity and the absence of compulsion. We do not recognise the climate of reconciliation in a situation where one spouse, to the knowledge of both, is under a necessity to make a vital decision within a brief and precisely limited time. At any rate, we are not satisfied that reconciliations would be so likely to be promoted in significant numbers that we can subscribe to the recommendation of an additional ground of divorce for desertion on the lines proposed.

Constructive desertion

151. Desertion has not been statutorily defined and the courts have hitherto refrained from attempting a definition. Desertion is understood to have taken place when there has been a separation of the spouses which is against the will of one spouse and which is accompanied by an intention on the part of the other spouse without just cause permanently to end the married life together. The circumstances in which desertion may take

place have been described as follows³¹: "In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him".

152. The term "constructive desertion" is now applied to the situation where one spouse is forced to leave the home by reason of the conduct of the other spouse. It is essential to prove two elements so far as the deserting spouse is concerned, namely, that his conduct was such as to drive the other spouse away and that there was an intention on his part to bring the married life to an end.

153. The conduct must be grave and weighty: "it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other 'for better, for worse'. The ordinary wear and tear of conjugal life does not in itself suffice"³². The application in recent judgments of expressions such as conduct "less than cruelty" or "falling short of cruelty" to conduct which is relied upon as justifying one spouse leaving the other caused some confusion over the nature of the conduct which will found a charge of constructive desertion. The explanation is that conduct by one spouse of a grave and weighty nature which makes married life unbearable for the other spouse may at the present time be pleaded before the court in one of three ways³³. If such conduct is accompanied by injury to health and the court is satisfied that it is "aimed at" the other spouse and that he needs protection, it will constitute legal cruelty, for which the remedy of divorce is immediately available. If one or more of the requirements of legal cruelty are lacking, but nevertheless there was present an intention, actual or presumed, on the part of one spouse to bring the married life to an end and to drive the other spouse from the home, the conduct will amount to constructive desertion, which, if persisted in for three years or more, will also give a right to divorce. If, however, the court is unable to find that the element of intention to expel is present, such conduct may yet be held to be ample justification for one spouse leaving the other and will therefore be a sufficient answer to a petition by the other spouse for restitution of conjugal rights³⁴, or for divorce on the ground of desertion³⁵.

154. The intention to expel may be inferred from the circumstances, and a person will be presumed to intend the natural and probable consequences of his acts. The English cases reveal two different trends of thought³⁶. On the one hand, it has been said that the presumption is not irrebuttable when applied to constructive desertion and that, however bad the husband's conduct may have been, he cannot be held guilty of constructive desertion if the facts are such as to show that the last thing he desired was that his wife should leave him. On the other hand, it has been said that

³¹ *Sickert v. Sickert*, [1899] P. 278, at p. 282.

³² *Buchler v. Buchler*, [1947] P. 25, at p. 45.

³³ See *Timmins v. Timmins*, [1953] 1 W.L.R. 757, at p. 762.

³⁴ See *Russell v. Russell*, [1897] A.C. 395; *Timmins v. Timmins*, [1953] 1 W.L.R. 757.

³⁵ *Edwards v. Edwards*, [1950] P. 8.

³⁶ These were reviewed by the Judicial Committee of the Privy Council in *Lang v. Lang*, [1955] A.C. 402.

where the husband's conduct is grave and weighty in nature, he must be presumed to intend his wife to leave him, however much he may desire her to remain. The view of the Judicial Committee of the Privy Council is that if the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to leave the home, that is enough to establish an intention to drive his wife out, however passionately he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect³⁷.

Views of fourteen members

155. (i) Fourteen of us³⁸ consider that some alteration in the law is necessary. We recognise that if the court in England adopts the view of the Judicial Committee of the Privy Council as expressed in the case of *Lang*, some of the difficulties which were present when we began our inquiry will have been removed. The effect of that decision is, however, merely to limit the circumstances in which the presumption can be rebutted. In our view, it is desirable that relief should be available whenever conduct on the part of one spouse of a grave and weighty nature has compelled the other spouse to break off cohabitation.

(ii) Accordingly we recommend that proof of conduct of a grave and weighty nature which is such that a spouse could not reasonably be expected to continue with the conjugal life should in future raise an irrebuttable presumption that the other spouse intended to bring the married life to an end. We wish to emphasise, however, that, just as in the case of cruelty (see paragraph 134), the remedy of divorce should be available only in respect of conduct which is really of a grave and weighty nature. Divorce should not be possible on this ground merely because husband and wife find themselves temperamentally unsuited.

(iii) We do not like the term "constructive desertion". In our opinion, so far as the law of England is concerned, no distinction need be drawn between circumstances where the deserting spouse leaves the home and circumstances where he or she drives the other spouse away by his or her conduct. We consider that it would be preferable to have a statutory definition of desertion and the following would achieve the objects we desire:

"One spouse shall be held to have deserted the other spouse when without reasonable cause and against the will of that other spouse he or she shall have brought cohabitation to an end or shall have prevented its resumption either

(a) by departing or remaining away from that other spouse or the matrimonial home, or

(b) by causing that other spouse to depart or remain away from him or her or the matrimonial home

(1) by actual expulsion, or

(2) by conduct of a grave and weighty nature which is such that the other spouse could not in the face of it reasonably be expected to continue with the conjugal life."

³⁷ *Lang v. Lang*, [1955] A.C. 402, at p. 429.

³⁸ Mrs. Allen, Dr. Baird, Mr. Beloe, Mrs. Brace, Lady Bragg, Sir Russell Brain, Mr. Brown, Mr. Flecker, Mrs. Jones-Roberts, Lord Keith of Avonholm, Mr. Maddocks, Mr. Justice Pearce, Lady Portal, Mr. Young.

Views of five members

156. Five of us³⁹ consider that the need for a petitioner to prove "an intention to drive away" is a necessary safeguard against too wide an extension of the doctrine, leading to the granting of divorce on the ground of incompatibility of temperament. We are therefore opposed to any alteration in the present law.

Effect of a separation agreement

157. The existence of an agreement between husband and wife to live separate and apart is a bar to divorce on the ground of desertion unless the agreement was obtained by fraud or coercion, or it was never acted on, or it can be shown that both parties have by their actions repudiated it and there is an intention on the part of one spouse to desert the other⁴⁰.

158. We understand that before desertion became a ground of divorce under the Matrimonial Causes Act, 1937, a number of separation agreements were concluded between spouses in circumstances in which in fact one spouse was the deserter and the other spouse merely acquiesced in something which he or she was unable to alter. The spouse who would have been able to seek a divorce on the ground of desertion after 1937 cannot do so because of the existence of the separation agreement, unless it can be said to have been repudiated on both sides. We consider that hardship arises where this cannot be shown and we recommend, therefore, that where husband and wife have separated before 1st October, 1937, in circumstances amounting to desertion on the part of one of them, the fact that before that date they entered into an agreement to live separate and apart should no longer operate to bar the deserted spouse from bringing a petition for divorce on the ground of desertion. We limit our proposal to agreements concluded before desertion became a ground of divorce because it must be assumed that parties who entered into an agreement after that date were aware of the consequences which would follow.

DESERTION: SCOTLAND

The present law

159. The law relating to desertion in Scotland differs from that in England in several important aspects.

160. In Scotland divorce for desertion was recognised by statutory enactment in 1573. The statute (now repealed) enacted "if either the husband or wife 'diverts from the other's company, without a reasonable cause alleged or reduced [deduced] before a judge, and remains in their malicious obstinacy by the space of four years', and refuses to obey privy admonitions to adhere, that then the deserted spouse shall raise an action of adherence, and decree being obtained therein, the deserter is to be charged to adhere; and this not sufficing, the deserter is then to be denounced a rebel and put to the horn; and, all this failing, the deserted one is to apply to the spiritual jurisdiction to admonish the deserter privately; and, if that is futile, then the minister of his parish is to admonish him publicly to adhere and then to excommunicate him; and if he does not adhere after all these things, then he is guilty of 'malicious and obstinat defectioun', and divorce may thereupon be granted"⁴¹. The Conjugal Rights (Scotland)

³⁹ Lord Morton of Henryton, Sir Frederick Burrows, Mr. Lawrence, Mr. Mace, Lord Walker.

⁴⁰ *Pardy v. Pardy*, [1939] P. 288.

⁴¹ See *Fraser on Husband and Wife*, Second Edition, pp. 1207-1208 (Vol. II, 1878).

Amendment Act, 1861, abolished these elaborate preliminaries which, apart from the necessity to raise an action of adherence, had fallen into desuetude. It also abolished the necessity to raise an action of adherence. An action for divorce could thereafter be raised immediately on the expiry of four years' desertion. That period was reduced to three years by the Divorce (Scotland) Act, 1938, Section 1 (1) of which provides that it is competent for the court to grant decree of divorce on the ground that "the defender . . . has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than three years".

161. It has been said that "desertion is a bilateral transaction which involves a spouse who deserts and a spouse who is simultaneously willing to adhere". It is evident that the various requirements of the law in the past were designed to test the sincerity of the pursuer by providing that only after repeated attempts to obtain the deserter's return could divorce proceedings be initiated. Scots law still places emphasis on this aspect and not only will the desertion cease if the deserting spouse makes a genuine offer to return at any time during the running of the three-year period but also the deserted spouse must satisfy the court that he or she was willing to adhere to the other spouse at all times throughout that period. It was thought by some that one effect of the Divorce (Scotland) Act, 1938, was to get rid of this latter requirement but when the matter was tested in 1939 the court held otherwise⁴². Opinion has been divided on whether any exception could be allowed to the rule⁴³ but a majority of the Inner House of the Court of Session has now held that there are no exceptions⁴⁴. In England, whilst a deserted spouse must at all times be ready and willing to affirm the marriage and take the deserting spouse back into the home if a genuine offer is made and there is no justification for refusing it, there is no such positive requirement as that of proof of willingness to adhere throughout the period of desertion charged.

162. Unlike the position in England, where desertion has to be charged up to the date of institution of proceedings, in Scotland once the three-year period of desertion has been established, the deserted spouse has thereafter a vested right to divorce; a genuine offer to return made by the deserting spouse at any time after the expiry of that period does not debar the other spouse from obtaining a divorce. The doctrine of the vested right upon the expiry of three years' desertion received full recognition only in 1941⁴⁵, when the House of Lords unanimously ruled that, whatever may have been the law before the Divorce (Scotland) Act, 1938, it was no longer necessary for the pursuer to aver that he had been willing to adhere right down to the date of bringing the action. Before 1938 there had been uncertainty on the point, although it appears that some decrees had earlier been granted on the view that a vested right to divorce arose once four years' desertion had been established.

Proof of willingness to adhere

163. We received a large volume of evidence that the requirement as to proof of willingness to adhere on the part of the deserted spouse should be entirely abolished. It may indeed be said that this recommendation was the one which attracted the widest measure of support from our Scottish witnesses. The requirement seems to us to result in hardship and injustice, and amounts to a temptation to commit perjury. As it was put in the evidence of the Society of Writers to Her Majesty's Signet, "The pursuer

⁴² *Macaskill v. Macaskill*, 1939 S.C. 187.

⁴³ See *Bell v. Bell*, 1941 S.C. (H.L.) 5.

⁴⁴ *Borland v. Borland*, 1947 S.C. 432.

⁴⁵ *Bell v. Bell*, 1941 S.C. (H.L.) 5.

may have, during the three years, passed 'from hope, through disillusionment and despair, to indifference and antagonism', and not be prepared to perjure himself or herself by denying the latter phase. The more honest the pursuer the more hopeless the case, the corollary being that there is a premium on prevarication"⁴⁶. That there is real hardship (in the sense of a denial to an honest pursuer of what may readily be obtained by a perjurer) is seen from a recent case⁴⁴ where divorce for desertion was refused to a Scotsman whose deserting wife had within the three-year period obtained a divorce from him in the United States. He honestly said that after that divorce he was not willing to adhere. Had he untruthfully said that he was willing, he would presumably have been granted a decree. The present law seems to us to place on the court what is the practically impossible task of enquiring into the state of mind of the pursuer throughout the three-year period.

164. Accordingly, we recommend that the requirement as to proof of willingness to adhere on the part of the pursuer throughout the three-year period of desertion should be abolished. In future, to found an action on this ground, it should be sufficient that the court is satisfied that initially there was desertion, i.e., separation against the will of the pursuer and not by agreement; that the desertion has been persisted in for not less than three years; and that at no time during that period has the pursuer refused a genuine and reasonable offer by the deserting spouse to return.

The vested right to divorce

165. We received no evidence suggesting a desire to change the law in respect of the vested right to divorce after desertion has run for three years, but the matter does of course come within our terms of reference and we have given it consideration, particularly with the prospect of reconciliation in mind.

166. The fact that the pursuer has a vested right seems to us to be in effect a deterrent to reconciliation. A deserting spouse may be genuinely repentant but if his offer to return is not made until after the expiry of the three-year period then the deserted spouse is entitled to reject it and that rejection in no way affects the latter's right to obtain a divorce. We recognise that so long as there is a requirement on the pursuer to prove willingness to adhere throughout the entire three-year period it may be reasonable to say that on the expiry of that period he or she should be absolved from any further duty towards the other spouse. This consideration has much less force if, as we recommend, that positive requirement is removed.

167. We think that if at any time before proceedings have been started the deserting spouse is genuinely willing to come back to the deserted spouse, the cause of complaint should be regarded as having been removed. We therefore recommend that the law should be amended to provide that in any action of divorce on the ground of desertion the court should have to be satisfied that the desertion has continued for a period of at least three years immediately before the raising of the action.

Continuity of the desertion

168. The problem which has been illustrated in paragraphs 143-145 concerning the effect of a resumption of cohabitation arises also in Scotland. The fourteen of us⁴⁷ who are of the opinion that, in order to encourage

⁴⁶ Paper No. 72, Minutes of Evidence, Twenty-fifth Day.

⁴⁷ Mr. Beloe, Mrs. Brace, Lady Bragg, Sir Russell Brain, Mr. Brown, Mr. Flecker, Mrs. Jones-Roberts, Lord Keith of Avonholm, Mr. Mace, Mr. Maddocks, Mr. Justice Pearce, Lady Portal, Lord Walker, Mr. Young.

the prospects of reconciliation, it would be desirable to allow a husband and wife to come together for a period not longer than a month, in order to see if they could bring about a lasting reconciliation (see paragraph 149), consider that the proposal should be introduced in Scotland as well as in England. We accordingly recommend, with five dissentients⁴⁸, that two periods of desertion which together amount to at least three years, within a period of three years and one month immediately before the raising of the action, should constitute a ground of divorce.

Constructive desertion—intolerable conduct

169. When discussing the proposals made to us with regard to cruelty, we have said that the principle which emerges from them is that divorce on that ground should be given as an immediate relief from a position where the continuance of normal married life has become impossible owing to the intolerable behaviour of one of the spouses. We have already explained that we do not consider that behaviour of this kind should be a ground for an immediate remedy unless it results in injury to health, or a reasonable apprehension of such injury, and is intended to affect the other spouse. Where one or both of these requirements is lacking a husband or wife in England may at present be able to obtain a divorce on the ground of constructive desertion and will be able to do so to a slightly greater extent if the majority recommendation in paragraph 155 is put into effect. In Scotland, however, the doctrine of constructive desertion has not been adopted. For one thing, it would not be consistent with the present requirement of proof of willingness to adhere. Scottish witnesses commented that the lack of a remedy gave rise to hardship in a number of cases. They were reluctant, however, to accept the doctrine of constructive desertion, preferring instead to put forward a new definition of cruelty. We appreciate that the doctrine of constructive desertion is a concept alien to Scots law and we do not, therefore, suggest that it should be adopted in Scotland.

Intolerable conduct

Views of fourteen members

170. (i) Fourteen of us⁴⁹ consider that there should be a remedy for hardship arising from intolerable behaviour which does not amount to legal cruelty. This remedy should be such as not to obstruct any genuine attempt by either spouse to restore the marriage on a proper footing.

(ii) As with constructive desertion in England (see paragraph 155), the conduct which is the subject of complaint must be of a grave and weighty nature analogous to, but not fulfilling all the requirements necessary to establish, legal cruelty. It must be such as to have resulted in the separation of husband and wife for a period of at least three years. This latter requirement will allow time for mature reflection and for the possibility of a reconciliation between them. The fact that one spouse leaves the other as a result of that other's conduct may act as a salutary warning. One such experience may be sufficient to effect a change of heart. The court should therefore be free to take into account any *bona fide* offer of amendment made by one spouse to the other at any time before the raising of the action and should withhold its decree from a spouse who is shown to have unreasonably rejected such an offer.

(iii) We therefore recommend that in Scotland conduct of a grave and weighty nature on the part of one spouse which is such that the other

⁴⁸ Lord Morton of Henryton, Mrs. Allen, Dr. Baird, Sir Frederick Burrows, Mr. Lawrence.

⁴⁹ Mrs. Allen, Dr. Baird, Mr. Beloe, Mrs. Brace, Lady Bragg, Sir Russell Brain, Mr. Brown, Mr. Flecker, Mrs. Jones-Roberts, Lord Keith of Avonholm, Mr. Maddocks, Mr. Justice Pearce, Lady Portal, Mr. Young.

Views of fourteen members (*continued*)

spouse could not in the face of it reasonably be expected to continue with the conjugal life should be a ground of divorce at the instance of that other spouse where it has resulted in the separation of the spouses (otherwise than by agreement) for a period of three years or more, provided that the court should take into account any *bona fide* offer of amendment made by the defender before the raising of the action and should not grant a decree to a pursuer who has unreasonably rejected such offer.

Views of five members

171. (i) Five of us⁵⁰ consider that there is no justification for such a striking extension of the grounds for divorce in Scotland. No doubt the introduction of this proposed new ground would relieve some present cases of hardship but on balance, in our view, it is not likely to "promote and maintain healthy and happy married life and to safeguard the interests and well-being of children", matters which we are enjoined by our terms of reference to bear in mind. Indeed, it is more likely to lead to divorce being granted in a number of cases for nothing more than mere incompatibility of temperament.

(ii) Moreover, we do not think that there is any wide general desire in Scotland for the introduction of this ground of divorce. Apart from one witness who supported its introduction, those who thought that some modification of the law was necessary had in mind a new definition of cruelty. Furthermore, it was said that there was a strongly held minority opinion in the legal profession that no alteration in the present law was necessary or desirable.

INSANITY : ENGLAND AND SCOTLAND

THE PRESENT POSITION

172. The Gorell Commission recommended that insanity should be made a ground of divorce in England, but this recommendation was not implemented until the passing of the Matrimonial Causes Act, 1937. The provisions of the Act of 1937 have now been embodied in Section 1 (1) of the Matrimonial Causes Act, 1950, under which a petition for divorce may be presented on the ground that the respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition".

173. Insanity became a ground of divorce in Scotland by virtue of the Divorce (Scotland) Act, 1938, Section 1 (1) of which provides that decree of divorce may be granted on the ground that the defender is incurably insane. By Section 6 (2), proof that the defender is, and has been for a period of five years continuously immediately preceding the raising of the action, under care and treatment as an insane person, raises a presumption that the insanity is incurable; the burden then rests upon the defender to prove the contrary. By Section 3, the court must in every case appoint a curator *ad litem* to protect the defender's interests and the General Board of Control for Scotland must on the request of the court supply a report on the probability of recovery of the defender. In practice a report is submitted in every case.

174. It will be noted that the provisions of the English and Scottish statutes differ in an important respect, in as much as the court in England

⁵⁰ Lord Morton of Henryton, Sir Frederick Burrows, Mr. Lawrence, Mr. Mace, Lord Walker.

has to be satisfied both that the insanity is incurable and that there has been a period of care and treatment for at least five years, whereas in Scotland proof of five years' care and treatment raises a presumption of incurable insanity. The provisions in the Scottish statute were introduced when the Matrimonial Causes Act, 1937, had been only a very short time in operation and were designed to avoid the difficulties which it was thought would arise from the requirement in the English statute that positive proof of incurable insanity must be given. It was said that it would often be impossible to get medical experts to testify that a person was incurably insane and that the most which could reasonably be expected of a medical expert was that he should certify that in his view recovery was improbable.

175. The circumstances in which a person of unsound mind is to be deemed to be under care and treatment have been strictly defined by the respective statutes, which provide, in effect, that a spouse must have been the subject of an order or warrant, issued under one or other of the various statutory provisions relating to lunacy, for his detention as a person of unsound mind during the whole of the period of five years⁵¹. (Hereafter, for convenience, we refer to such persons as certified patients.) In England, one exception is allowed in as much as a period of treatment as a voluntary patient which immediately follows a period of treatment as a certified patient may be included in the qualifying period.

RETENTION OF INSANITY AS A GROUND OF DIVORCE

176. All but a few of the witnesses accepted that insanity should be retained as a ground of divorce. The reasons given by those few for their view that insanity should no longer be a ground were much the same as the reasons rejected by the majority of the Gorell Commission and by Parliament in 1937 and again in 1938. We do not think that the arguments against having insanity as a ground are any more cogent than before. Where a spouse, at the end of sufficient period of care and treatment, is held to be incurably insane, the continuance of a normal married life has clearly become impossible; as the Gorell Commission said, "the married relationship has ended as if the unfortunate insane person were dead, and the objects with which it was formed have become thenceforward wholly frustrated". Such circumstances constitute a very exceptional case in which the hardship to the other spouse is so great that, in our view, the remedy of divorce should be available.

CRITICISMS OF THE PRESENT LAW

177. The chief criticism of the present law arises from the fact that, subject to the minor exception already noted in respect of England, divorce is available to a spouse only if the other spouse has been a certified patient for at least five years in a mental hospital or similar institution. There has been an increasing tendency, however, to regard certification as the very last step in the course of treatment for mental illness and then to be taken only when it is imperative for the patient's own welfare or the public safety. Thus, in England Section 1 of the Mental Treatment Act, 1930, provides that a person suffering from mental illness may voluntarily submit himself for treatment in a mental hospital on making a written application. In Scotland

⁵¹ This has been held to include

(i) in certain circumstances, a "temporary patient" detained under Section 5 of the Mental Treatment Act, 1930, *Benson v. Benson*, [1941] P. 90, and *Bithell v. Bithell*, [1954] 3 W.L.R. 463, and

(ii) a person detained under an urgency order issued under Section 11 (1) of the Lunacy Act, 1890, *Chapman v. Chapman* (No. 2), [1954] 1 W.L.R. 1332.

treatment as a voluntary patient has been possible for a long time, by virtue of Section 15 of the Lunacy (Scotland) Act, 1866. The stigma which is still to some extent attached in the public mind to certification is thus avoided and the sufferer is encouraged to undergo treatment as a voluntary patient at an early stage in his illness and in the knowledge that he may ordinarily end such treatment at will. Moreover, as a result of comparatively recent developments, mental illness can now be treated outside the provisions of the relevant Acts⁵². In England, for instance, treatment is available in the psychiatric ward of general hospitals or in special neurosis hospitals or in an annexe of certain designated mental hospitals, the annexe having been specifically excluded from the designation. In Scotland, observation wards and psychiatric units have similarly been attached to general hospitals for the treatment of mental illness outside the provisions of the Acts.

178. As the witnesses pointed out, while it is desirable to avoid certification as far as possible, this may result in considerable hardship for the patient's spouse. The patient may have spent some years in a mental hospital before he is certified; by that time it may be clear that his insanity is incurable and that all hope of the resumption of a normal marriage relationship must be given up, yet his spouse has to wait until the full period of five years' care and treatment as a certified patient has elapsed before taking divorce proceedings. It is also possible for relief to be completely denied, because the patient, although incurably insane, continues to keep his voluntary status simply because the need for certification never arises. (We understand, however, that the number of persons in this category is small.)

179. It was also said that with modern advances in medical skill and knowledge, it is possible to ascertain whether or not the patient will respond to treatment well within the period of five years prescribed by the English and Scottish statutes; and that to have to wait for so long before being able to take divorce proceedings causes unnecessary hardship to the patient's spouse.

180. A further criticism relates to the geographical limitation imposed on the statutory definition of care and treatment. For the purpose of divorce proceedings in England, the Matrimonial Causes Act, 1950, recognises care and treatment, as defined, in Scotland, Northern Ireland, the Channel Islands and the Isle of Man but no provision is made for the recognition of care and treatment undergone in any other country⁵³. This limitation may occasion hardship, as for instance, where a man has sent his wife, for special treatment for her mental illness, to some country other than those listed; or if his wife's illness develops in some country to which his work has taken him.

181. The statutory requirement that the care and treatment must have been continuous has also given rise to difficulty; for instance, where there has been an omission to comply with some formality in respect of the issue or continuation of the order for the detention of the person of unsound mind; or there has been a period of temporary absence from the mental hospital; or the patient has been discharged and has then had a relapse necessitating his re-admission to the hospital.

182. Lastly, it was put to us by some witnesses that those members of the medical profession who are called upon in divorce proceedings in England

⁵² A patient receiving treatment under the provisions of these Acts can be admitted only (i) to a hospital under the National Health Service which has been designated or approved for that purpose, or (ii) to a hospital or home outside the National Health Service which has been specially registered, licensed or approved. (In England he may also be committed to the single care of an individual, though this form of treatment is now rarely used.)

⁵³ Some doubt exists whether care and treatment in Northern Ireland, the Channel Islands and the Isle of Man can be included in the qualifying period in proceedings in Scotland.

to give an opinion on the state of mind of a patient are in some difficulty, in as much as they are often reluctant to commit themselves to the positive statement that the insanity is incurable. This problem does not arise in Scotland because the fact that the patient has been under care and treatment for at least five years raises a presumption of incurability.

PROPOSALS RECEIVED

183. Some English witnesses made proposals for a radical change in the law in order to meet the criticisms described. One proposal was that the question whether the respondent is incurably of unsound mind should be treated solely as a question of fact and should be the only matter upon which the court would have to be satisfied before granting a decree. Thus, evidence that there had been a period of care and treatment, whether as a certified or voluntary patient and whether in England or Scotland or any other country, would be relevant only in so far as it formed part of the evidence as to incurability; the petitioning spouse would, therefore, be able to bring divorce proceedings as soon as the other spouse's condition was pronounced to be incurable. A similar proposal contained, in addition, the safeguard that the respondent should have been of unsound mind for at least two years before the proceedings were taken. The English legal witnesses who supported these proposals agreed in oral evidence that they would accept that there should be a short period of care and treatment in a mental hospital before proceedings were started if the medical profession considered this necessary.

184. Another proposal was that, in addition to proof that the insanity is incurable, the court should have to be satisfied that the respondent had been suffering from mental disorder for a continuous period of five—some witnesses said three—years. In addition, the respondent should have been under care and treatment in a mental hospital for at least one year before proceedings were started. This proposal was supported by the English medical witnesses. It was argued that in view of the extended facilities for treatment at the present day, it is more appropriate to look to the continuity of the mental disorder as indicative of its severity rather than to the continuity of care and treatment in a mental hospital. The hardship to the patient's spouse caused by a long waiting period before divorce is available would thereby be greatly reduced, but there would still be a safeguard for the patient against hasty divorce. The requirement that there should be a short period of care and treatment in a hospital would ensure that medical evidence on the nature and extent of the disorder was available to the court and would prevent proceedings being started against a spouse living in the matrimonial home.

185. Other English witnesses and the Scottish witnesses contemplated that the difficulties might be met within the present framework of the law by modifying the definition of care and treatment so as to include treatment as a voluntary patient and treatment in other countries. Some witnesses also suggested that it should be possible to aggregate a number of periods of care and treatment, where it was clear that the mental illness itself had persisted over the whole period.

THE COMMISSION'S VIEWS AND RECOMMENDATIONS

186. We understand that opinion in the medical profession is divided on whether incurability should be the sole test, but that the majority is averse from assuming the responsibility for giving a decision on the incurability of the patient's condition without the supporting background of a prescribed period during which the mental disorder must have been in existence. The

need to wait for some specified period does ensure that a spouse is not tempted to obtain a speedy release from marital obligations which may have become onerous and unrewarding and also ensures that every opportunity is given for the patient to recover from his illness.

187. Moreover, insanity has no precise definition and is a term used to describe varying degrees of mental disorder ranging from a mild delusional state to the extreme cases of paranoia or schizophrenia. In our view, divorce should be available only to a person whose spouse is suffering from insanity to such an extent that it can be said that the objects of the marriage relationship have been wholly frustrated. It seems to us, therefore, that the adoption of incurability as the sole test would not be satisfactory and that some additional safeguard is required which will serve as a criterion of the severity of the mental disorder.

188. The choice appears to us to lie between the duration of the mental illness, and the duration of care and treatment received in a hospital or similar institution. The first test was proposed by the English medical witnesses. We have given it very careful consideration and we have decided that we cannot accept it as a sufficient safeguard. In itself it provides no sure criterion of the severity of the disorder. It is possible for a person to suffer from mental illness in a minor degree for a long time without being required to attend a hospital as an in-patient. Moreover, the introduction of evidence of the existence of mental illness before the patient had been treated in a hospital would lead to doubt and controversy whether the illness was in fact present at the material time.

189. In our opinion the most satisfactory safeguard is to require a sufficient period of care and treatment in a hospital or similar institution to have elapsed before proceedings can be started. This is a test which has worked quite satisfactorily in both England and Scotland over a number of years. But we think that the present statutory definition of care and treatment is too narrow in the light of modern developments in the treatment of persons suffering from mental illness. As the evidence submitted to the Royal Commission on the Law relating to Mental Illness and Mental Deficiency shows, there is a wide measure of agreement in the medical profession that in order to encourage people to seek treatment in the early stages of mental illness, it is important to allow them to obtain such treatment with the minimum of formalities, and as far as possible in the same way as they can obtain treatment for any other kind of illness. There is now less emphasis placed on certification and future developments may cause a test based on that status to become unworkable. Further, it is clear that considerable importance is attached to the desirability of encouraging patients, as part of their treatment, to resume their place in the community by allowing them to go on holiday or to return home for short periods. We have made our recommendations against this background.

(1) SCOPE OF CARE AND TREATMENT

190. Most witnesses considered that care and treatment as a voluntary patient should be recognised as constituting care and treatment for the purpose of divorce proceedings. We think that this is right. The objection advanced against this proposal is that the knowledge that treatment as a voluntary patient may be used to support divorce proceedings against him will deter a person from submitting himself to care and treatment at an early stage of his illness, when treatment is more likely to be successful. We do not agree. We doubt very much whether the possibility of divorce proceedings being taken against him would enter the mind of the person suffering from mental disorder at the time he applied for admission to a mental hospital.

191. We consider, however, that it would be inadvisable merely to add care and treatment as a voluntary patient to the present definition of care and treatment. As we have already mentioned (in paragraph 177), mental illness may now be treated outside the provisions of the relevant Acts. We have been told that it often depends on the facilities which are available in his district whether a person is admitted to a mental hospital as a voluntary patient or to the psychiatric ward of a general hospital. To exclude from the qualifying period treatment in hospitals or institutions outside the provisions of the Acts would, in our opinion, create an arbitrary distinction. It is not the status of the patient which is significant, but the fact that he has been receiving care and treatment for mental illness in a hospital or other institution.

192. We accordingly recommend that care and treatment in any hospital or other institution in England, Scotland, Northern Ireland, the Isle of Man or the Channel Islands, which is provided or approved, by the appropriate authority, for the treatment of mental illness, should be deemed to be care and treatment for the purpose of divorce proceedings on the ground of insanity in England and in Scotland.

193. This definition is intended not only to cover care and treatment in those hospitals in England and Scotland which are at present affording treatment for mental illness either within⁵⁴ or outside the relevant Acts, but also to allow for the recognition of care and treatment in any hospital or other institution which may be provided by or approved by the appropriate authority under any machinery which is later established. As we have said, the Royal Commission on the Law relating to Mental Illness and Mental Deficiency has had considerable evidence on this matter and we have therefore thought it advisable to keep in mind developments which may take place in the future⁵⁵.

194. It may be noted that our definition will clarify the position in respect of treatment in England as a temporary patient⁵⁶. At one time there was some doubt whether such treatment qualified under the definition of care and treatment in the Matrimonial Causes Act, 1950. It has now been held⁵⁷ that, as from the time when the patient has been visited in accordance with the terms of Section 5 of the Mental Treatment Act, 1930, and the visitors have signed a certificate that he should continue to be detained as a temporary patient, the detention ranks as detention under an order. There remains, however, the period of two or three weeks before the patient is visited.

195. The definition would also remove the difficulty which has arisen in England, when, owing to some technical irregularity, there has not been an order in force for a patient's detention as a certified patient, although the patient has in fact been receiving care and treatment in the hospital. In those circumstances, the court has sometimes had to refuse a decree of divorce.

⁵⁴ We include for this purpose treatment in the single care of an individual.

⁵⁵ See also Cmd. 9623, 1955, for proposals for the amendment of the law in Scotland.

⁵⁶ Section 5 of the Mental Treatment Act, 1930, provides that where a person suffering from mental disorder is incapable of expressing either willingness or unwillingness to undergo treatment, he may be admitted to a mental hospital on an application, accompanied by a recommendation signed by two doctors. The patient may then be detained for a period of up to six months. The period of detention may be extended by direction of the Board of Control for two further periods of three months each.

⁵⁷ *Bithell v. Bithell*, [1954] 3 W.L.R. 463.

(2) CONTINUITY OF CARE AND TREATMENT

196. In both England and Scotland care and treatment during the qualifying period must have been continuous. We think that this rule should be retained. It would, however, result in unnecessary hardship if it were so interpreted as to exclude the possibility of short absences from any hospital (or other institution) where treatment has been given. In view of our adoption of a definition of care and treatment which recognises care and treatment in any approved hospital, irrespective of the status of the patient, we have had to give some thought to the exceptions which should be allowed to the rule.

197. We first describe the arrangements at present in force in respect of absences from a hospital in the case of certified and voluntary patients. As we have said, it is now an accepted part of treatment for some forms of mental illness that the patient should be allowed to leave the hospital for short periods. In England, with the permission of the person in charge, a certified patient may leave a mental hospital in certain circumstances without the absence being regarded as a discharge. He may be absent for not more than four days on short leave, or for an indefinite period, in practice usually three months, on trial if he is under consideration as being suitable for discharge. In addition, sometimes a patient may be boarded out with a relative or friend, if the hospital authority is satisfied that he will receive proper care. It has now been held that the continuity of care and treatment is not broken by such absences so long as the order remains in force⁵⁸. In Scotland, whenever there is a probability of recovery, a certified patient may be authorised by the General Board of Control to be absent on probation for a period not exceeding twelve months, during which time the order for his detention remains in force⁵⁹. Leave of absence from a mental hospital may also be granted by the person in charge for a period not exceeding twenty-eight days.

198. However, in both England and Scotland the order automatically lapses and the patient has to be certified again before he can be re-admitted to the hospital, if a patient who has been absent with leave fails to return at the appointed time, or if a patient escapes and is at large for longer than the period laid down by statute (fourteen days in England and twenty-eight days in Scotland).

199. A voluntary patient may discharge himself on giving seventy-two hours notice to the medical superintendent of the hospital. If the discharge takes place against the advice of the medical superintendent and he thinks that the patient ought not to be at large, for his own good or for the public safety, arrangements will be made for him to be certified within a short time of his discharge. Alternatively, a voluntary patient is sometimes allowed to be absent for a short period without discharge, on the understanding that he will return for further care and treatment⁶⁰. In this case, his name is retained in the hospital's current records, and he does not have formally to apply for re-admission.

200. In the first place, we think that so long as the patient's name is retained in the current records of the hospital it is right to regard him as being under care and treatment. Accordingly, we recommend that for the purpose of divorce proceedings a patient should be deemed to have been continuously under care and treatment if, notwithstanding that he has been absent from the hospital or other institution, his name has been retained

⁵⁸ *Safford v. Safford*, [1944] P. 61.

⁵⁹ The Divorce (Scotland) Act, 1938, provides that a person is to be deemed to be under care and treatment while the order for his detention is in force.

⁶⁰ We understand that in Scotland in practice these absences are for not more than three days.

in the current records of the hospital or other institution. This provision would allow a patient, whatever his status, to be absent from the hospital for a holiday or on trial or to undergo treatment for physical illness⁶¹, without the continuity of care and treatment being regarded as broken.

201. We consider, however, that, if hardship is to be avoided, provision should also be made to meet the case where a patient is discharged or discharges himself from a hospital but is re-admitted, or admitted to another hospital, within a very short time. So long as any break in care and treatment does not exceed twenty-eight days, we think that the continuity of care and treatment, for the purpose of divorce proceedings, should be deemed not to have been interrupted⁶², and we recommend accordingly. We do not contemplate that any limit should be set to the number of such breaks, provided that each is not longer than twenty-eight days.

(3) LENGTH OF PERIOD OF CARE AND TREATMENT

202. We appreciate that, because of advances in medical skill and technique and the increasing practice of allowing the patient in the first stages of his illness to receive care and treatment in his home, it may be possible to say that his condition is incurable before the statutory period of five years' care and treatment has elapsed. But with this ground of divorce the most stringent safeguards should be taken for the benefit of the person who is being divorced. We consider that, if the definition of care and treatment is to be extended, as we have recommended, it would be unwise to make any further change in the law at the present time by reducing the length of the qualifying period of care and treatment.

(4) UNIFORMITY BETWEEN ENGLAND AND SCOTLAND

203. It seems to us anomalous that in respect of a comparatively new ground of divorce there should continue to be a fundamental difference between England and Scotland such as exists at the present time (see paragraph 174). We consider, therefore, that it would be preferable in this particular instance to have uniformity between the laws of the two countries.

204. While the requirement to testify positively that the patient is incurably of unsound mind may have raised some difficulties in England when it was first introduced, these seem to have been of a temporary nature only. Since 1937 considerable advances have been made in treating the various types of mental disorder and we can see no reason why the formula at present accepted by the court in England, namely, that the mental disorder is incurable in the light of present-day medical knowledge, should present any real difficulty. The alternative formulae which have been suggested would all, in our opinion, considerably widen the scope of this ground of divorce. So long as some prospect of recovery remains, the remedy of divorce should not be available to the other spouse. The General Board of Control for Scotland has said that in spite of the advances made in the treatment of mental illness there may, in its opinion, still be some cases where it would be difficult to provide positive evidence of incurability. The Board considers, therefore, that the present procedure in Scotland should be retained, that is to say, that care and treatment for five years should raise a presumption of incurability. We have carefully considered the Board's representations but we remain of the opinion that the court should require positive proof of incurability. The Board has

⁶¹ See *Swymer v. Swymer*, [1954] 3 W.L.R. 803.

⁶² In the case of a certified patient who fails to return after a period of leave or escapes, the break in care and treatment will be deemed to begin on the date on which the order lapses (see paragraphs 198 and 200).

pointed out that the present procedure in Scotland has worked well. But we are recommending that the scope of the definition of care and treatment should be widened and it seems to us that it is then very necessary that the court should have to be satisfied that the insanity is incurable so far as medical knowledge can ascertain at the time. We recommend accordingly.

(5) REPRESENTATION OF THE PERSON OF UNSOUND MIND

205. By virtue of Rule 64 of the Matrimonial Causes Rules, 1950, the Official Solicitor becomes, if he consents, the guardian *ad litem* of any respondent against whom divorce proceedings on the ground of insanity have been taken in England. There is provision in the Rules for application to be made to the court at any stage of the proceedings for some other person to be appointed guardian but we understand that in practice the Official Solicitor consents to act as guardian *ad litem* in every case that is brought to his notice provided that a suitable undertaking is given by the petitioner for payment of the whole or part of the Official Solicitor's costs. We further understand that the Official Solicitor, acting as guardian *ad litem*, invariably obtains an independent medical opinion on the state of the respondent's mental disorder.

206. In our opinion it is essential, more particularly in view of our recommendations for the widening of the definition of care and treatment, that the interests of the respondent should be carefully safeguarded during the proceedings. We consider that the present practice, as we have just described it, works well, adequately protects the interests of the respondent and should be continued. We are satisfied that the court would not make an order for the appointment of some person other than the Official Solicitor as guardian *ad litem* without requiring the same careful procedure to be adopted.

207. With regard to the practice in Scotland, we have already mentioned that under the present law the court is required in every action for divorce based on the defender's insanity to appoint a curator *ad litem* to protect the defender's interests. We consider that this practice should continue.

208. We understand that the report which is at present furnished to the court on certified patients by the General Board of Control for Scotland is usually based on the report of the medical superintendent of the mental hospital in which the defender is receiving care and treatment. It is only when there is some doubt about the probability of the patient's recovery that the General Board of Control obtains an independent medical opinion based on an examination by the Board's Medical Commissioners. We think it an important safeguard to have an independent medical opinion in every case, as is the practice in England, and we recommend, therefore, that in every action raised on the ground of the defender's insanity the General Board of Control should be required to furnish a report on whether the defender is considered to be incurably of unsound mind in the light of present-day medical knowledge, based on an examination by its Medical Commissioners.

(6) GEOGRAPHICAL LIMITATION ON CARE AND TREATMENT

209. We are agreed that hardship may be caused to a person whose spouse has received care and treatment in some country other than those at present listed in the statute. We see no reason why a period of care and treatment in any part of the world should not count towards the qualifying period, provided that there are adequate safeguards for the protection of the spouse of unsound mind. Conditions of care and treatment may vary considerably from country to country and it is important to ensure that the patient has been given every possible form of treatment appropriate to the

type of insanity from which he is suffering, before the court accepts that he is incurably insane in the light of present-day knowledge. We recommend, therefore, that for the purpose of divorce proceedings a person should be deemed to have been under care and treatment while he has been receiving care and treatment in a country other than those already listed in the statute, according to standards which are substantially the same as those obtaining in respect of the care and treatment of patients suffering from mental illness in England or in Scotland as the case may be. The burden should be on the spouse taking divorce proceedings to satisfy the court that the standards in the country concerned are substantially the same as those in England or in Scotland. We did consider whether the task of making appropriate enquiries should be placed on a Department of State, which, if satisfied that the conditions in the country investigated were substantially the same as those in England or Scotland, would cause the name of the country to be added to the list by Statutory Instrument. We concluded, however, that there would not be sufficient cases of this type to justify an official investigation and the consequent expenditure of public money.

SODOMY AND BESTIALITY : ENGLAND AND SCOTLAND

210. In England, the court may grant a divorce to a wife, but not to a husband, on the ground that the other spouse has been guilty of sodomy or bestiality. Occasionally, however, a husband has been able to obtain relief on the ground of cruelty because his wife has been guilty of such unnatural practices. It would appear that under the criminal law a woman can be charged with the commission of acts of this nature ; Section 61 of the Offences against the Person Act, 1861, draws no distinction between male and female in making this type of conduct a criminal offence liable to be punished by imprisonment. Moreover, in allowing a wife to obtain a divorce on the ground of an act of sodomy committed by her husband on her person, the divorce law has recognised that sodomy may take place not only between males but between a male and female. We recommend, therefore, that husband and wife should now be placed on the same footing and that in England either spouse should be able to obtain a divorce on the ground that the other spouse has been guilty of sodomy or bestiality.

211. In Scotland, sodomy and bestiality were made grounds of divorce for the first time by the Divorce (Scotland) Act, 1938. This provision of the Act has not been the subject of judicial interpretation. Under the criminal law of Scotland, sodomy refers only to acts between males and it may well be that, should the occasion arise, the Court of Session would feel bound to follow the criminal law in this respect. Moreover, it is doubtful whether a woman can be charged with the offence of bestiality. We consider, however, that a husband should be able to obtain a divorce in Scotland on the ground that his wife has participated in an act of sodomy or bestiality. We recommend, therefore, that it be made clear, by definition, that for the purpose of the divorce law in Scotland "sodomy" includes an act between man and woman which if done between man and man would amount to sodomy ; and "bestiality" includes intercourse by a woman with a beast.

CHAPTER 5

RESTRICTIONS

RESTRICTION ON PROCEEDINGS WITHIN THE FIRST THREE YEARS OF MARRIAGE

A. England

212. In England, since 1937, there has been a restriction on taking proceedings for divorce within the first three years after the marriage. A petition may not be presented within that period unless the court is satisfied that the case is one of exceptional hardship suffered by one spouse or of exceptional depravity on the part of the other spouse. When considering an application for leave, the judge must have regard to the interests of the children and to any reasonable probability of the parties being reconciled before the time-limit expires.

213. The restriction was criticised by witnesses for various reasons. First of all, it was said that it is a fundamental precept that where there has been a wrong, the law should not withhold a remedy. It also was said that the restriction fails to encourage spouses to attempt a reconciliation and does not deter them from taking divorce proceedings; where a matrimonial offence is committed by one spouse during the three-year period, the other spouse merely waits for the period to elapse before starting proceedings. The enforced waiting period may drive both spouses into illicit unions. Moreover, in those cases where leave is given to present a petition, the costs of obtaining the divorce are greatly increased by the extra proceedings required.

214. Some witnesses suggested that the restriction should be entirely removed, others that it should be modified by reducing the waiting period or by giving the court a wider discretion to allow proceedings to be started.

215. The purpose of the restriction is to encourage husbands and wives to face and resolve their differences in the period of adjustment which necessarily takes place during the first few years of married life, and thus to reduce the number of broken marriages. Whether in practice it has had this effect can only be a matter of opinion, since the statistics available are of instances where the restriction has failed in its purpose and not of instances where it has been successful. We consider that on the whole the restriction has had a stabilising effect on marriage. In view of the gravity in England of the problem of the broken marriage, we could not recommend the abolition of a measure which may go some way towards diminishing that problem.

216. We have considered whether the period should be reduced or lengthened but have concluded that three years is a reasonable time to allow for the process of adjustment. We are also not in favour of the court's discretion being widened. To leave the court without any sort of guidance as to the principles upon which such a discretion should be exercised would impose on it a most difficult task and would create uncertainty in the law. Moreover, any relaxation of the present exceptions to the general rule would, in our view, seriously impair the deterrent value of the restriction. We consider, therefore, that leave should continue to be given only in cases of exceptional hardship or exceptional depravity.

217. It has been said that because applications for leave under the proviso have to be heard in chambers, very few reports are available and it is difficult to know on what lines the judicial discretion is exercised; in

consequence the law on what constitutes exceptional hardship or depravity is not uniform. Indeed, this was a criticism made by the Denning Committee¹. Under the existing practice, however, it is always possible for a judge, if he thinks fit, to adjourn the proceedings in chambers and give his judgment in open court.

B. Scotland

218. In Scotland, an action for divorce may be raised at any time after the marriage. We do not consider it necessary to introduce into Scotland a restriction similar to that in England. In 1954, the number of divorces granted by the Court of Session in respect of marriages which had not lasted more than three years was 55, out of a total number of divorces for that year of 2,200. From that number must be taken those cases in which, had there been a restriction, the pursuer would in any event have been allowed to raise an action. We consider, therefore, that there is not a problem in Scotland sufficiently large to justify such an innovation; and there was little evidence in support of such a proposal from the Scottish witnesses.

OTHER RESTRICTIONS

219. We have considered and rejected, after careful consideration, a number of proposals made to us for introducing some new form of restriction on the granting of divorce. Most of these proposals would place an onerous burden on the court by entrusting it with the exercise of a difficult discretion and in our view would not result in any material benefit to the community. We have decided not to add greatly to the length of our Report by setting out these proposals and stating our reasons for rejecting each one of them. One such proposal, however, should be mentioned. This was that the court should be given a discretion to refuse a decree where it thinks that this would be in the interests of any children of the marriage. We consider that it would be a most difficult, if not impossible, task for the court to have to decide whether or not a divorce should be refused for this reason; the provision would be of little value if in the end a decree were granted in almost every case. It may also be doubted whether the children's interests would be best served if they could be regarded by their parents as the reason for the failure of the divorce proceedings. We think that the proposal which we put forward in Part V of our Report provides a better way of facing parents with their responsibilities towards their children.

¹ Cmd. 6945, paragraph 14, Second Interim Report.

CHAPTER 6

BARS TO RELIEF

220. Although the court may have jurisdiction and grounds of divorce can be proved to exist, it does not always follow that a divorce will be granted, since the conduct of the spouse seeking relief may in certain circumstances act as a bar to relief. Where there has been collusion between the parties, or where the matrimonial offence has been condoned or connived at by the spouse seeking relief, the court must refuse a decree. In addition, the court in England has in certain circumstances a discretion to grant or refuse a decree. The most frequent exercise of the court's discretion is in respect of the petitioner's adultery. In Scotland there are no discretionary bars (except where in an action on the ground of insanity the pursuer's conduct has conduced to the insanity).

221. In both countries the courts will enquire into conduct which constitutes a bar to relief, whether this is pleaded by the other spouse as a defence or comes to the notice of the court in some other way. In England a statutory duty has been laid on the court to enquire in every case, so far as it reasonably can, as to the existence of collusion, connivance or condonation. In practice, the petitioner is required to swear to the absence of such conduct in the affidavit which he files in support of his petition. If, however, the court is not satisfied, it is bound to dismiss the petition. In Scotland the pursuer has to take the oath of calumny to the effect that the facts stated are true and that there is no concert or collusion between the parties, but the court must be satisfied that there has in fact been collusion, connivance or condonation before it can refuse a decree.

222. We do not recommend any material change in the existing bars to relief in English and Scots law. Some English witnesses suggested that the bars of collusion, connivance and condonation should in effect be abolished or, in the case of the two last, be converted into defences which could be raised by the respondent if he wished, but which otherwise would not operate to bar relief. It seems to us, however, that, when relief is sought in respect of a matrimonial offence, it is right, if there has been collusion, connivance or condonation, that relief should always be refused, whether such conduct is pleaded by the other spouse as a defence or comes to the notice of the court in some other way. Indeed, that view seems to us implicit in the doctrine of the matrimonial offence.

223. As we show, there are certain differences between the bars to relief in England and Scotland, but we do not think that it would be desirable to attempt to assimilate the two laws in this respect, since the differences largely derive from the different traditions of the matrimonial laws of England and Scotland.

ADULTERY: ENGLAND

224. Before 1857, the adultery of the petitioner acted as an absolute bar to the granting by the Ecclesiastical Courts of a divorce *a mensa et thoro* (judicial separation), in pursuance of the rule that a party seeking relief must come to the court free from all matrimonial misconduct¹. The Matrimonial Causes Act, 1857, conferred on the newly formed Court for Divorce and Matrimonial Causes a discretion to grant a decree of divorce notwithstanding that the petitioner had committed adultery during the marriage.

¹ See *Orway v. Orway* (1888), 13 P.D. 141. In fact, this rule continued to be applied to petitions for judicial separation down to 1937.

The court has continued to exercise this discretion ever since, the statutory authority now being Section 4 of the Matrimonial Causes Act, 1950. To secure to the court knowledge of the material facts, a petitioner who has committed adultery during the marriage must ask in the prayer to his petition for the discretion of the court to be exercised in his favour and he must disclose full details of the adultery in a written statement which is handed to the judge at the hearing. A solicitor is under a duty to point out to his client the requirements of the law in this respect.

225. From 1857 until the close of the nineteenth century, the discretion to grant a decree was exercised on certain well-defined but restricted lines. Since then, the court has come to view its discretion as being completely unfettered and at the present time relief is granted in all but the most flagrant cases. The matters to which the court should pay regard have been summarised by the House of Lords as follows²:

- (a) the position and interest of any children of the marriage ;
- (b) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage ;
- (c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife ;
- (d) the interest of the petitioner, and, in particular, the interest that the petitioner should be able to re-marry and live respectably ; and
- (e) the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

226. In recent years, in exercising its discretion to grant relief, the court has relied a great deal upon the consideration that it would be contrary to public policy to insist on the maintenance of a union which has utterly broken down. It has been the subject of recent judicial comment³ that there would appear to have been a tendency for the court to overlook the fact that the House of Lords envisaged that this consideration should be balanced against the other consideration, namely, respect for the binding sanctity of marriage.

227. Some witnesses commented that the prayer for the exercise of the court's discretion has become a mere formality in as much as a decree is refused only in rare cases. The court would seem, it was said, to pay more regard to a full disclosure being made than to the extent of the adultery admitted. Some of the witnesses took the view that, as the adultery of the petitioner is usually symptomatic of the breakdown of the marriage, it should no longer be a bar to that marriage being dissolved and they suggested, therefore, that it should be left to the respondent to cross-petition for divorce on the ground of the petitioner's adultery, as is the position in Scotland. On the other hand, it was suggested by other witnesses that there should, to a limited extent, be a return to the previous practice, when the exercise of the discretion in a petitioner's favour was restricted ; in future a decree should usually be refused where the petitioner had indulged in promiscuous adultery or where the adultery had conduced to the matrimonial offence with which the other spouse had been charged.

² *Blunt v. Blunt*, [1943] A.C. 517.

³ *Moor v. Moor*, [1954] 2 All E.R. 458.

228. We consider that adultery should remain a discretionary bar to relief in England. This rule has been an integral part of English matrimonial law for a long time and to discard it would, in our opinion, imply that the obligations of the marriage bond could be lightly regarded. We are, indeed, concerned at the suggestion in the evidence submitted to us that there is a tendency to regard the prayer for the exercise of the court's discretion as a mere formality. We do not suggest that the use of the discretion should be fettered in any way, as it was some fifty years ago, but we do wish to emphasise that in taking into account the consideration that it may be contrary to public policy to maintain a marriage which has completely broken down, it is necessary to give at least equal weight to the other consideration, namely, the maintenance of "respect for the binding sanctity of marriage" (see paragraph 226).

ADULTERY : SCOTLAND

229. In Scotland, the adultery of a pursuer who has established grounds of divorce to the satisfaction of the court does not constitute a bar to relief. It is, however, open to the other spouse to bring a cross-action of divorce. This has been the law of Scotland since the end of the 17th century and we do not recommend any change.

COLLUSION : ENGLAND

230. By Section 4 of the Matrimonial Causes Act, 1950, a duty is laid on the court to enquire, so far as it reasonably can, whether any collusion exists between the parties. If the court is not satisfied in this respect, it must dismiss the petition. Collusion is not defined by the statute, but it has been interpreted judicially on a number of occasions. According to these decisions, the essence of collusion is that there should have been an agreement or bargain between husband and wife as a result of which one of them undertakes to bring proceedings for divorce. The bar is imposed to ensure that the position does not arise whereby the court is deprived by act of the spouses of "the security for eliciting the whole truth, afforded by the contest of opposing interests [as in a defended case], and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice"⁴. Thus, proceedings are collusive, not only if the petition is founded on false charges but also, notwithstanding that the charges are true, if the acts on which they are based have been committed as part of the bargain, or if the petitioner would not have taken proceedings but for the bargain, or if the respondent has agreed to suppress facts which would have constituted a good defence.

231. Most of our witnesses were of the opinion that the law as to collusion is confusing and that there is a marked tendency to brand as collusive arrangements between the parties which are not in fact detrimental to the administration of justice. They pointed out that it is natural that husband and wife would wish to make early arrangements for the future of the children, and that a wife would wish to have some assurance about the provision to be made for her maintenance and for the division of the home, and, sometimes, for the payment of the costs of the proceedings. Yet, as the law stands at present, the parties must be advised that such arrangements will have to be left until after the divorce, for fear that the court will regard the proceedings as collusive. Moreover, a spouse may be deterred from approaching the other spouse with a view to reconciliation because proceedings for divorce following on the failure of the attempted reconciliation might be regarded as collusive.

⁴ *Churchward v. Churchward and Holliday (the Queen's Proctor intervening)*, [1895] P. 7.

232. To avoid these difficulties it was suggested that collusion as a bar to divorce should be abolished, on the ground that conduct which now comes under the heading of collusion, and which should quite properly be a bar to relief, in any event comes within the meaning of the other bars to relief, such as connivance. Alternatively, it was said that collusion should be so defined that it would apply solely to cases where the person seeking relief intended to deceive the court or to abuse the process of law. Another suggestion was that collusion should be a discretionary bar, so that, even where the proceedings were found to be collusive, a decree should be pronounced if the court considered that no substantial miscarriage of justice would be caused by so doing. A further suggestion was that arrangements between husband and wife relating merely to maintenance, custody and costs should be expressly taken out of the bounds of collusion, provided that they were disclosed to the court.

233. This problem came before the Denning Committee in its consideration of means of promoting reconciliation⁵. The Committee took the view that "the law as to collusion does not need amendment but needs to be better understood" and that the law did not prevent husband and wife from coming together to discuss the possibility of reconciliation, or failing that, the ancillary arrangements which should be made in the event of a divorce. Nevertheless, as the evidence before us shows, there is still uncertainty as to the bounds of the law.

234. In our view it is still necessary to retain collusion as an absolute bar. There are arrangements between the parties which are at present collusive and which in our opinion should remain a bar to the granting of relief. The present law is to a large extent based on the consideration that husband and wife should be restrained from conspiring together to put forward a false case or to withhold a just defence, but there is, in addition, the further consideration that a divorce should not be obtained if the petitioner has been bribed by the other spouse to take proceedings or has exacted a price from him for so doing. The present difficulties have arisen, in our opinion, because of the absence of a clear definition of the latter consideration. We consider that there is no need for a change of principle but we recommend that collusion should be defined by statute on the basis of the considerations we have described.

235. We accept that it may be advantageous that the parties should be able to discuss through their solicitors arrangements which will adjust their position after the divorce, provided that any agreement reached is not the result of a bargain of the nature we have described. We recommend, therefore, that it should be expressly provided by statute that it should not amount to collusion if reasonable arrangements are arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs. It should be the duty of the petitioner to bring to the notice of the court at the hearing any such arrangements entered into between the parties. Since on occasion the parties may be in some doubt whether the proposed arrangements would be acceptable to the court, we consider that they should be able to apply to the court (by originating summons before the presentation of the petition or by summons during the pendency of the suit) for its opinion on the reasonableness of any contemplated arrangements. It is important, however, that if the court gives an opinion on the reasonableness of any arrangements proposed for the children, it should not be in

⁵ See Cmd. 7024, paragraph 29 (xi), Final Report.

any way bound by that opinion when it has subsequently to consider the position of the children, in accordance with our recommendation in paragraph 373.

COLLUSION : SCOTLAND

236. In Scotland collusion has for very many years been defined as an agreement to present a false case or to withhold a just defence. This definition has recently been affirmed by a decision of the Inner House of the Court of Session⁶. No witness suggested that any difficulty arises in the operation of the present law and accordingly we do not propose that any alteration should be made.

CONDONATION : ENGLAND

237. Condonation by one spouse of a matrimonial offence committed by the other spouse acts as an absolute bar to a divorce being granted in respect of that offence. An offence is condoned where the injured spouse, with knowledge of the material facts, forgives the other spouse and confirms that forgiveness by re-instatement in the matrimonial home⁷. A husband who has sexual intercourse with an adulterous wife, with knowledge of her adultery, or with a wife who has treated him with cruelty, is deemed conclusively to have condoned the offence unless it can be shown that the intercourse was induced by the wife by a fraudulent mis-statement of fact⁷. Where a wife has intercourse with her husband in similar circumstances, the presumption of condonation is rebuttable, in as much as it is said that it may be difficult for a wife immediately to break off relations with her husband. In England a matrimonial offence which has been condoned may be revived by the commission of a further matrimonial offence. This latter offence need not be such as to afford grounds for divorce in itself; thus, condoned adultery can be revived by a period of desertion for less than three years⁸. It would appear, however, from recent judicial pronouncements that the court would be reluctant to hold that an offence could be revived after a long interval of time⁹.

238. The chief criticism advanced by the witnesses was that the law as to condonation deters husbands and wives from making any attempt at a reconciliation. A wife (say) may feel that, if the attempt fails, divorce is the only alternative. She may therefore be reluctant to make any approach to her husband because the fact that they have come together, if only for a few days or weeks, will deprive her of the remedy of divorce if the court holds that the matrimonial offence has thereby been condoned. Where the husband is the injured spouse he is in a particular difficulty, because of the irrebuttable presumption of condonation which is raised should he have sexual intercourse with his wife. [We have already discussed a similar problem in connection with the effect of a resumption of cohabitation on the continuity of desertion (see Chapter 4). In the case of adultery or cruelty, however, the decision rests solely with the injured spouse whether or not to forgive the offence.

239. A suggestion which was made to the Denning Committee¹⁰, and which that Committee put forward for consideration, was that "a matrimonial offence should not be held to be condoned . . . unless the injured party

⁶ *Riddell v. Riddell*, 1952 S.C. 475.

⁷ *Henderson v. Henderson and Crellin*, [1944] A.C. 49.

⁸ *Beard v. Beard*, [1946] P. 8.

⁹ *Beale v. Beale*, [1951] P. 48.

¹⁰ Cmd. 7024, paragraph 86, Final Report.

has, with knowledge of the material facts, forgiven and reinstated the other in his or her position as husband or wife, provided that the fact that the parties, in an endeavour to effect reconciliation, have lived together as husband and wife, shall not be sufficient to constitute forgiveness and reinstatement unless and until reconciliation has been effected". This proposal received support from several of our witnesses. We consider, however, that the proposal, as it stands, would give rise to greater uncertainty than at present exists. If the attempt failed after husband and wife had been together for, say, one month, the injured spouse would not know whether he had lost the remedy of divorce until the court had decided whether or not in the particular circumstances the coming together had amounted to a reconciliation. The injured spouse would therefore still be unlikely to risk the loss of his remedy. In fact, it might prove very difficult for the court to conclude that there had been other than a reconciliation if husband and wife had lived together for several days or weeks. Moreover, it would in our view be a most undesirable result if the proposal led to the situation where the parties could live together for several short periods or perhaps for one long period and yet it could be held that that did not amount to condonation. A further objection is that the spouse who had committed the matrimonial offence would be put on trial during the period or periods of cohabitation and thus an atmosphere would be created which would not be conducive to successful reconciliation.

240. It seems to us that the present difficulties could only be avoided if it were possible for the law as to condonation successfully to reconcile two conflicting considerations, namely:

- (i) there must be some stage at which the injured spouse must be held to have abandoned the right to a divorce arising out of the matrimonial offence of the other spouse, so that the marriage may be put once more on a solid foundation of mutual affection and confidence, with an assured future for both spouses; and
- (ii) there should be a reasonable opportunity for the injured spouse to make a serious trial of life with the other spouse and to obtain a clear view of the probabilities of its ultimate success before he abandons the right to a divorce arising out of the matrimonial offence of the other spouse.

Fourteen of us¹¹ consider that this result can be achieved by allowing husband and wife to have a trial period of cohabitation of up to one month, which should be deemed not to amount to condonation (see paragraph 242). The other five of us¹² are unable to support this proposal (see paragraph 243).

241. Whether or not there is to be a trial period of cohabitation, we are all agreed that it is anomalous that husband and wife should not be on the same footing with regard to the presumption of condonation which is raised by acts of sexual intercourse between them. We consider that there can be circumstances at the present time when the fact that one spouse has had sexual relations with the other does not amount to that full forgiveness and reinstatement which in our view should constitute condonation. We recommend, therefore, that an act or acts of sexual intercourse between husband and wife, after the commission of a matrimonial offence by one which is known to the other, should raise a presumption that the offence has been thereby condoned, which presumption may be rebutted by sufficient evidence to the contrary.

¹¹ Mr. Beloe, Mrs. Brace, Lady Bragg, Sir Russell Brain, Mr. Brown, Mr. Flecker, Mrs. Jones-Roberts, Lord Keith of Avonholm, Mr. Mace, Mr. Maddocks, Mr. Justice Pearce, Lady Portal, Lord Walker, Mr. Young.

¹² Lord Morton of Henryton, Mrs. Allen, Dr. Baird, Sir Frederick Burrows, Mr. Lawrence.

Views of fourteen members

242. (i) Fourteen of us¹¹ consider that where the breakdown of the marriage is imminent, some positive step should be taken to encourage husband and wife to come together for a short period so that they can find out whether it is possible for them to resume married life. In our opinion, the factor most likely to promote a successful reconciliation is that husband and wife should be able to live together for a short time in the matrimonial home. At present, for example, when a husband is faced suddenly with knowledge of his wife's infidelity he must at once leave the home (or at the very least move to a separate room) if he is not to lose his right to divorce. It is in just such a crisis that the ordinary man needs a little time and the opportunity to try out his affection for his wife so that he may discover whether he can overcome the disaster by reconciliation. In cases where they have parted immediately or are not together when he learns the news they cannot at present explore the possibilities of reconciliation by trying it out in their own home. Reconciliation cannot thrive in the atmosphere of a solicitor's office or over the table in a restaurant.

(ii) We therefore recommend that where one spouse has committed adultery, or has treated the other spouse with cruelty, the spouses should thereafter be allowed a trial period not exceeding one month during which they could come together in an attempt to effect a reconciliation, and that nothing which ensues during that period should be regarded as amounting to condonation of the previous matrimonial offence. If husband and wife are not living together when one learns of the adultery committed by the other, or if they separate in consequence of the adultery or cruelty of one of them, the trial period should be the first subsequent period during which they come together by agreement. If they do not separate when one first learns of the commission of adultery by the other, then the trial period should be deemed to start from the date on which the facts came to the knowledge of the injured spouse. Acts of sexual intercourse between husband and wife which occur outside the trial period would give rise to a rebuttable presumption of condonation. We envisage that it would follow that the presumption would be more difficult to rebut should an unsuccessful trial period already have taken place.

(iii) We think that this proposal avoids the difficulties which would arise from the adoption of the suggestion mentioned in the Denning Report. In the first place, the injured spouse would know that, provided the cohabitation did not last longer than a month, he would not lose the remedy of divorce should the attempted reconciliation be unsuccessful. The court would be in no difficulty, in as much as whatever took place during the trial period would be removed from its ken. We recognise that the proposal is open to criticism in that the spouse who has committed the matrimonial offence may feel himself to be "on trial" but that consideration would be present whatever scheme were adopted. Moreover, the period of trial would be strictly limited and not indefinite as under the other suggestion. We are encouraged in making our recommendation by the fact that when a proposal on these lines was put to the witnesses, most of them agreed that it might be the solution to the problem.

Views of five members

243. The five of us¹² who are opposed to the introduction of a trial period of cohabitation where one spouse has deserted the other (see paragraph 150), are also opposed to the introduction of a trial period in respect of any other matrimonial offence. In many instances, a return to cohabitation for a period of up to one month, accompanied most probably

Views of five members—continued

by acts of sexual intercourse which may result in the birth of a child, will in fact constitute that full forgiveness and reinstatement which amounts to condonation (subject always to the possibility of revival by the commission of a further offence). And yet, under the proposal, it is to be deemed not to be condonation if the injured spouse decides, before the month has passed, that he does not wish to continue married life. In our opinion such a situation would be quite inconsistent with the whole concept of condonation. Moreover, we find unacceptable a proposal which would in effect put one spouse on trial during this period. It would mean that the injured spouse could put an end to the cohabitation during the trial period for the flimsiest reasons or for no reason at all, and even although the other spouse was genuinely repentant and anxious that married life should be continued. Such conditions are not, we think, best fitted to promote reconciliation. For these reasons, we consider that the injured spouse must make up his mind at the outset whether he wishes to resume married life with the other spouse, and thus incidentally to risk losing the remedy of divorce should the attempted reconciliation fail, or whether he prefers to take the remedy of divorce. That decision may be difficult, but if a trial period of cohabitation were allowed, the decision whether or not to put an end to it would often be just as difficult.

CONDONATION : SCOTLAND

244. As in England, condonation of a matrimonial offence is a bar to a decree of divorce being granted in respect of that offence. The concept of condonation is, generally speaking, the same as that in England. The doctrine of revival of a condoned offence, however, is not part of the law of Scotland; once a matrimonial offence has been forgiven it cannot be used to found an action of divorce.

245. There was very little evidence that the law as to condonation causes any difficulty in Scotland. There is some authority for the view that, as in England, an irrebuttable presumption of condonation is raised against the husband who has sexual relations with his wife knowing that she has committed a matrimonial offence. The presumption against the wife in those circumstances is rebuttable. We are agreed that husband and wife should be put on the same footing and we recommend that the presumption should be rebuttable whether the husband or the wife is the injured party.

Views of fourteen members

246. (i) The fourteen of us¹¹ who support the introduction of a trial period of cohabitation in England consider that it is of sufficient importance to justify its introduction into Scotland. We recommend, therefore, that the proposal which we have set out in paragraph 242 (ii) should also be applied to Scotland.

(ii) In addition, we consider that this proposal should apply to the new ground, based on intolerable conduct, which it is recommended (by a majority of the Commission) should be introduced into Scotland (see paragraph 170). On the assumption that this new ground becomes law, we recommend that where husband and wife have separated as the result of conduct on the part of one which has been such that the other could not continue with the conjugal life, they should be able to come together by agreement for one trial period not exceeding one month. Whatever ensues during that period should not amount to condonation nor should the period be deemed in any subsequent divorce proceedings to have broken the running of the period of separation.

CHAPTER 7

SPECIAL DEFENCES

247. There are certain special defences which, if substantiated to the satisfaction of the court, will prevent the spouse claiming relief from establishing the commission of a matrimonial offence. Thus, the mental incapacity, at the material time, of the spouse alleged to have committed the offence may negative desertion or legal cruelty and, in Scotland, the adultery of the pursuer during the triennium will prevent him from getting a divorce on the ground of desertion. The court will consider these matters whether they are pleaded specially by the respondent or defender or come to its notice in some other way.

ADULTERY AS A DEFENCE TO A CHARGE OF DESERTION: SCOTLAND

248. As we have said previously, until 1861 the remedy of divorce for desertion was given only after the defender had disobeyed a decree of adherence. The Act of 1861 did away with the necessity for the deserted spouse to raise an action of adherence, but desertion continued to be regarded as equivalent to a breach of the duty to adhere. A deserting spouse is under no duty to adhere to the other spouse once the latter has committed adultery; if there is no duty on the defender to adhere, he cannot be said to be in desertion. A pursuer who commits adultery during the statutory period of three years' desertion is therefore barred from obtaining a divorce on that ground. It was thought that the Divorce (Scotland) Act, 1938, had given a new meaning to the word "desertion" and that it no longer connoted breach of the duty to adhere. But the House of Lords (by a majority of three to two) has held¹ that "desertion" continues to have the meaning ascribed to it before the Act of 1938. The bar operates, therefore, whether or not the spouse in desertion knew of the adultery and, if he did know, whether or not it contributed to his desertion or affected his intention to remain in desertion.

249. Most of the Scottish witnesses criticised the law as being unduly harsh in denying relief to a pursuer whose adultery in no way contributed to the desertion of the other spouse or affected its continuance. Witnesses referred to the law in England, where (subject to the over-riding discretion of the court to grant or refuse relief if the petitioner has committed adultery) the respondent will be held to have wilfully deserted the petitioner without cause unless it is shown that the latter's adultery brought about the desertion or influenced the respondent to continue in it². Although the witnesses were agreed that a change should be made in the Scots law, they differed in their views on what that change should be. Most witnesses considered that the pursuer's adultery should continue to bar relief where it is proved that the adultery contributed to the defender's original desertion or to its continuance; in all other cases the pursuer should have a right to a decree. One witness suggested that it should be open to the defender to raise the pursuer's adultery as a defence on the ground that it conduced to his desertion or to its continuance; if the court finds this to be proved, it should refuse a decree; otherwise, the pursuer's adultery should not act as a bar to relief. Other witnesses proposed that the court should be given a discretion to grant or refuse relief whenever the pursuer has committed adultery, that is to say, whether or not it had conduced to the initial desertion or to its continuance.

¹ *Wilkinson v. Wilkinson*, 1943 S.C. (H.L.) 61.

² *Herod v. Herod*, [1939] P. 11.

250. We accept the criticism of the law made by the witnesses. Indeed, it follows from our recommendation for the abolition of the requirement as to proof of willingness to adhere on the part of the pursuer throughout the three-year period of desertion (see paragraph 164) that we accept that desertion should no longer be equivalent to a breach of the duty to adhere. Nevertheless, the pursuer's adultery is still a very material factor which the court should take into account in deciding whether the defender's desertion has been wilful and without reasonable cause. We do not propose, however, that the court should be given a discretion to refuse a decree where the pursuer's adultery has not contributed to the desertion, since we are not recommending that the court should have such a discretion where the ground of divorce is other than desertion (see paragraph 229). We recommend, therefore, that adultery should be a bar to a divorce on the ground of desertion only when it is shown to have conduced to the desertion, or to its continuance during the statutory period. The bar should be absolute because we do not see on what basis the court could grant a decree in the exercise of a discretion when it has been shown that the statutory ground of desertion without reasonable cause does not exist.

251. We do not think that it should be left to the defender to put forward the pursuer's adultery as a defence. Instead, we recommend that every pursuer who raises an action for divorce on the ground of desertion should be required at an appropriate stage in the proceedings to disclose, if such is the case, that he has committed adultery. In an undefended action it should then be for the court to decide on the pursuer's averment, together with his evidence on oath, whether the adultery had conduced to the desertion alleged, or to its continuance during the statutory period.

INSANITY AS A DEFENCE: ENGLAND AND SCOTLAND

252. Where the insanity of a spouse who is alleged to be guilty of cruelty or desertion was such at the material time as to prevent him from forming the intention to be cruel or to be in desertion, the court is faced with the problem of deciding whether a matrimonial offence has been committed notwithstanding the absence of the element of intention. In the following paragraphs we deal with the question as it relates to charges of cruelty and desertion.

Insanity as a defence to a charge of cruelty

253. In the case of cruelty, alternative courses have been open to the court. As we have mentioned previously (in paragraph 126), the provision of relief on the ground of cruelty derives from the need to protect a spouse from the possibility of future injury. If a divorce is to be regarded, not as a punishment for past cruelty, but as protection against future cruelty, the fact that the spouse was insane at the time he did the cruel acts would not be a good defence. This was the view adopted by the High Court in England in the case of *Lissack*³, in which a divorce on the ground of cruelty was granted against a husband who had been found guilty but insane on a criminal charge of murdering the child of the marriage. It is also the view taken by the Scottish court. However, the development of this rule has been complicated in Scotland by the suggestion that, if the defender has been certified insane and is detained in a mental hospital, the pursuer is no longer in need of protection and, therefore, should not be given a divorce on the ground of cruelty⁴. This view has not been accepted in the later

³ *Lissack v. Lissack*, [1951] P. 1, following the opinion of Denning L. J. in *White v. White*, [1950] P. 39.

⁴ See *M'Lachlan v. M'Lachlan*, 1945 S.C. 382; *MacFarlane v. MacFarlane*, 1952 S.L.T. 8.

case of *Dobbie*⁵, in which it was said that the court should apply the test laid down in the case of *McDonald*⁶, and should look not only to the present circumstances but to whether it would be safe for the pursuer if she were called upon to resume cohabitation with the defender at that time, even though the question might be hypothetical in the circumstances.

254. The second course is to adopt the same test of responsibility as for a criminal offence. If it is necessary to prove the existence of an intention to do certain acts in order to establish the commission of a particular criminal offence, the insanity of the person charged may be pleaded in defence as tending to show that at the material time he was incapable of forming the necessary intention.⁷ This course was adopted by the Court of Appeal in England, in the case of *Swan*⁸; the court disapproved of the reasoning in the case of *Lissack* and laid emphasis on the fact that it is inconsistent with the view of cruelty as a matrimonial offence, that relief should be given solely on the ground of protection and without paying regard to whether the respondent knew what he was doing at the time. In the later case of *Palmer*⁹, it was held that both limbs of the M'Naghten rules are applicable to an issue of cruelty in matrimonial proceedings.

255. It would follow that if, as some witnesses suggested, it should no longer be necessary to prove the element of intention in order to establish legal cruelty, insanity would no longer be a good defence. One of the Scottish witnesses, however, would retain insanity as a defence to a charge of cruelty but considers that there should be a new ground of divorce based on intolerable behaviour, which would afford relief to a spouse where the other spouse has committed cruel acts devoid of volition on his part.

256. Whichever course is adopted, there will be some hardship. On the one hand, where the wife (say) is still fearful of further injury were married life to be resumed, and all affection for her husband has been destroyed by the cruelty suffered, ought the remedy of an immediate divorce to be denied to her? On the other hand, where acts, though cruel, have been done by a man who was insane, ought he to be penalised by an immediate divorce without any waiting period to allow for the possibility of his recovering from the mental illness which alone has been responsible for the cruelty complained of? In our view, preference should be given to the interests of the injured spouse. We recommend, therefore, that insanity should not be a good defence to a charge of cruelty in matrimonial proceedings.

Insanity as a defence to a charge of desertion

257. In England, the fact that a spouse who is alleged to be in desertion has been certified as insane subsequent to the initial act of desertion raises a doubt whether he has been capable of a continuing intention to desert. It has been held by the House of Lords¹⁰ that in such circumstances the court must decide on the evidence whether or not such an intention has in fact continued. The capacity of a person of unsound mind may vary according to the type and degree of severity of the mental disorder from which

⁵ *Dobbie v. Dobbie*, 1953 S.L.T. 281; 1955 S.L.T. 63.

⁶ *McDonald v. McDonald*, 1939 S.C. 173.

⁷ The test of responsibility for a criminal act, applied rigidly in England since 1843, is contained in the replies of the judges to questions put to them by the House of Lords, commonly known as the M'Naghten rules, and is as follows: "... to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong".

⁸ *Swan v. Swan*, [1953] P. 258.

⁹ *Palmer v. Palmer*, [1954] 3 W.L.R. 756.

¹⁰ *Crowther v. Crowther*, [1951] A.C. 723.

he is suffering and a person may be quite capable of a continuing intention to desert whilst insane in other respects. The same question of fact arises where the spouse is a voluntary or temporary patient¹¹. In Scotland, the point has not yet had to be decided. As desertion must be proved to be wilful, presumably the same considerations would apply as in England, at least in respect of desertion during the triennium.

258. The evidence we have received on this subject has been prompted by the hardship which is caused to a spouse, who, having been deserted by the other spouse, is deprived of the remedy of divorce on the ground of desertion if the deserting spouse becomes insane to such a degree as no longer to be capable of retaining the intention to desert. One witness suggested that where insanity supervenes almost immediately following the initial act of desertion the court should consider whether the desertion was in fact a manifestation of the mental disorder and should not grant a divorce on the ground of desertion if it finds that that was so; but that where the deserting spouse has been insane for a short time during the three years' desertion, such period (or periods) of insanity should be deemed not to have interrupted the desertion. Our attention has also been drawn to the law in New Zealand¹² and in South Australia¹³, under which desertion is deemed not to have been terminated by reason of the insanity of the deserting spouse if it appears to the court that the desertion would probably have continued if he had not become insane.

259. It would seem that under the present law the court would refuse to find desertion proved if it were clear that the initial act of desertion was a manifestation of the insanity and that there was in fact no conscious intention to desert. We consider that there should be no change in the law in this respect, subject to one exception with which we deal below (see paragraph 261).

260. It may be clear, however, that the initial act of desertion took place by the conscious volition of the deserting spouse; yet he may subsequently become insane to such a degree that it is impossible to say that he is capable of retaining the intention to desert. The deserted spouse is then deprived of the remedy of divorce on the ground of desertion; or, if the insanity is only temporary, relief is delayed. In our opinion, in such cases it would be reasonable that desertion should be deemed not to have been interrupted by the insanity of the deserting spouse if it appears to the court that the desertion would probably have continued if he had not become insane. We recommend accordingly.

261. We have recommended (by a majority) that, in England, proof of conduct of a grave and weighty nature on the part of one spouse which is such that the other spouse has been forced to leave the matrimonial home, should raise an irrebuttable presumption that the conduct was intended to bring the married life to an end and, therefore, constituted desertion (see paragraph 155). In those circumstances, we consider that, even if the conduct of the deserting spouse is wholly or partly due to a mental disorder from which he is suffering, desertion should be deemed to have taken place; to hold otherwise, would in our opinion take insufficient account of the situation of the injured spouse. For the same reason, we consider that insanity should not be a good defence to a charge based on the new ground of intolerable conduct which (by a majority) we are recommending for introduction into Scotland (see paragraph 170).

¹¹ *More v. More*, [1950] P. 168.

¹² Section 13A, Divorce and Matrimonial Causes Act, 1928, as amended by the Divorce and Matrimonial Causes Amendment Act, 1953.

¹³ Section 43b, Matrimonial Causes Act, 1929-1938, as amended by the Matrimonial Causes Act Amendment Act, 1941.

INTOLERABLE CONDUCT AS A DEFENCE : SCOTLAND

262. A spouse who separates from the other spouse by reason of conduct falling short of cruelty or adultery runs the risk of himself being divorced on the ground of desertion, because, as some of the Scottish witnesses pointed out, it has not yet been clearly established whether misconduct falling short of a substantive matrimonial offence may be an adequate defence to a charge of desertion. The House of Lords expressly refrained from giving an opinion¹⁴, but since then there have been indications that the court might be prepared to regard such conduct as justifying the separation. Indeed, the trend of recent decisions in the Outer House and the Sheriff Courts has been to accept such conduct in particular circumstances as a good defence¹⁵.

263. We have recommended (by a majority) that conduct of a grave and weighty nature on the part of a spouse, which is such that the other spouse cannot reasonably be expected to continue with the conjugal life, should be a ground of divorce if it has resulted in the separation of the spouses for a period of three years or more (see paragraph 170). It follows that such conduct should also be a defence to a charge of desertion, and we recommend accordingly.

¹⁴ *Mackenzie v. Mackenzie*, 1895, 22 R. (H.L.) 32.

¹⁵ *Hamilton v. Hamilton*, 1953 S.L.T. 285; *Hutcheson v. Hutcheson*, 1953, 69 Sh.Ct.Rep. 228; *Caesar v. Caesar*, 1954 S.L.T. (Sh.Ct.) 18.

PART II

NULLITY OF MARRIAGE

A. ENGLAND

THE PRESENT LAW

264. There are two types of defective marriage, namely, those which are void and those which are voidable. In the former case the marriage is void *ab initio* owing to the absence of some prescribed formality or to the presence of some impediment or disability in one or both of the parties, which from the outset renders the contract of marriage null and void, and a decree of nullity is merely declaratory of the position. A voidable marriage, on the other hand, remains valid until a decree of nullity has been pronounced by a competent court.

265. The grounds on which a marriage is void *ab initio* are:

- (a) if the prescribed ceremonies of marriage are not properly performed ;
- (b) if either party is under sixteen years of age ;
- (c) if the parties are within the prohibited degrees of relationship by blood or affinity ;
- (d) if either party has been married previously and that marriage is valid and still subsisting ;
- (e) if either party is a lunatic so found by inquisition or is suffering from insanity to such an extent as to be incapable of understanding the nature of the ceremony or as to have insane delusions on the subject ;
- (f) if there is lack of true consent by either party, for example by reason of duress or mistake.

266. Until 1937 a marriage was voidable on the ground only of incapacity to consummate the marriage. By the Matrimonial Causes Act, 1937, however, additional grounds of nullity were provided, and these are now to be found in Section 8 of the Matrimonial Causes Act, 1950, which reads as follows:

“ 8.—(1) In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground—

- (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage ; or
- (b) that either party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1938, or subject to recurrent fits of insanity or epilepsy ; or
- (c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form ; or
- (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner :

Provided that, in the cases specified in paragraphs (b), (c) and (d) of this subsection, the court shall not grant a decree unless it is satisfied—

- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged ;
- (ii) that proceedings were instituted within a year from the date of the marriage ; and
- (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.”

PROPOSALS FOR GENERAL GROUNDS OF NULLITY

267. The extent of the witnesses' proposals for a more general ground of nullity varied. In its widest form the proposal was that there should be a general and comprehensive ground of nullity based on the fraudulent or wilful concealment of material facts which, if known to the petitioner, might have caused him to forego the marriage. Proposals for more limited grounds appeared to be based on the same concept. In support of such proposals it was pointed out that several of the grounds of nullity introduced by the Matrimonial Causes Act, 1937, are dependent on the petitioner's not being aware at the time of marriage of the existence of facts rendering the marriage voidable. This, it was said, implied that the concept just mentioned had to some extent already been accepted.

268. However that may be, we consider that the adoption of a general ground of the kind contemplated would create serious practical difficulties. The phrase, "wilful concealment of material facts", is extremely wide, and in our view to make this a ground of nullity would cause a great deal of uncertainty and would be bound to give rise to difficulties of interpretation. Indeed, there would be the danger that a widening interpretation might in time allow marriages to be annulled on the flimsiest pretext.

269. Even where the proposal is put in a more limited form, for example where it is restricted to cases of grave disease or abnormality, similar difficulties would arise. The phrase, "grave disease" is lacking in precision and while it might be possible in time for the court, assisted by the medical profession, to evolve some working rule, this would almost certainly be arbitrary in its results. It would work inequitably, by going too far in providing relief in some cases and by excluding others, perhaps more deserving, with consequent hardship.

270. It was said that since insanity and epilepsy are already grounds of nullity, there is no logical reason why grave physical or moral defect or instability, not disclosed at the time of marriage, should not also provide grounds of nullity. The grounds of insanity and epilepsy are discussed in later paragraphs, but in our view there is justification for recognising these as separate grounds, and their acceptance does not to our mind raise any difficulty of definition.

271. A further proposal based on this general concept was that it should be a ground of nullity if before marriage one party had undergone treatment, medical or surgical, which had rendered him or her physically incapable of becoming a parent, and the other party was ignorant of this fact at the time of the marriage. We understand that such treatment in fact falls into two categories. Firstly, there are some kinds of treatment which invariably make the person treated incapable of becoming a parent. It is impossible to know the number of persons affected, but we consider that this is a situation which is likely to arise in very few marriages. Secondly, there are other kinds of treatment the results of which are uncertain; the person treated may or may not be made incapable of becoming a parent. It would not be right to allow a marriage to be annulled in this case, because of the element of doubt. But grave difficulties and unhappiness might arise if this second category were to be excluded from relief and the first category provided for. Moreover, we have had no evidence that at present hardship is caused in an appreciable number of cases by relief not being available on this ground.

272. In sum, we consider that the existing grounds of nullity cover the major cases of hardship and that an extension would create more difficulties than it would remove.

PROPOSALS IN RESPECT OF THE PRESENT GROUNDS OF NULLITY

273. The main criticisms made of the existing grounds of nullity relate to insanity, mental deficiency, epilepsy and wilful refusal to consummate the marriage. We deal with each of these in turn. In considering insanity, mental deficiency and epilepsy, it must, however, be borne in mind that relief on these grounds has been sought in a very small number of cases. The problem is thus a limited one.

Insanity

274. As we have said, a marriage is void *ab initio* if, at the time of the ceremony, one of the parties was a lunatic so found by inquisition or was suffering from insanity to such an extent that he was incapable of understanding fully the nature of the ceremony in which he was taking part or he had insane delusions on the subject. In addition, since 1st January, 1938, a marriage has been voidable on the ground that either party to the marriage was at the time of the marriage:

- (i) of unsound mind ; or
- (ii) a mental defective within the meaning of the Mental Deficiency Acts, 1913-38 ; or
- (iii) subject to recurrent fits of insanity.

The provisions of the Section are based to a large extent on a recommendation of the Gorell Commission of 1909. The Commission wished to provide for the case where the person of unsound mind, though of sufficient understanding to have given a valid consent at the time of marriage, is yet, by reason of his mental state, unfitted for marriage and the procreation of children¹.

Unsoundness of mind at the time of the marriage

275. The phrase in Section 8 (1) (b) of the Act of 1950, "that either party to the marriage was at the time of the marriage of unsound mind", was criticised by the medical witnesses as being insufficiently precise ; it was pointed out that it may overlap (and therefore conflict with) that part of the law under which the marriage is void *ab initio* in certain circumstances if either party is of unsound mind. The proposal put to us by some of the witnesses was that the marriage should be void *ab initio*, (i) if the person was incapable of understanding the nature of the ceremony or had insane delusions on the subject, or (ii) if he was a certified patient (irrespective of whether or not he was incapable of understanding the nature of the ceremony or had insane delusions on the subject). It was appreciated that the effect of this proposal would be to take away provision for the annulment of a marriage entered into, during a lucid interval, by a person of unsound mind who was not certified. The witnesses considered, however, that cases of this kind would be met by the introduction of their proposed general ground, based on wilful concealment of a grave disease or abnormality. We have already said that we are unable to accept the proposal for a general ground of this nature and it follows that we cannot accept this other proposal, because it would make no provision for a class of case for which relief should be available. We do, however, accept the witnesses' criticism of the wording of the Section. We recommend that it should be re-drafted so as to make it clear that it refers only to a person who has gone through a ceremony of marriage with a full understanding of the nature of that ceremony and of what it imports but who nevertheless was of unsound mind at the time.

¹ Cd. 6478, paragraph 353.

Mental deficiency

276. The medical witnesses were agreed that the statutory provision making mental deficiency a ground of nullity was unsatisfactory, but they differed on the solution. It was said that it is not clear from the phrase, "a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1938", whether the respondent must have been certified under those Acts, or merely "ascertained" by the local authority, or whether it is in fact sufficient to bring forward medical evidence of the existence of mental defectiveness. It was pointed out that the proportion of mental defectives "ascertained" and "certified" varies greatly in different local authority areas, depending on such factors as the policy and activity of each local authority, and the institutional accommodation available. Some witnesses suggested that the criterion should be the actual existence of a state of mental defect as defined in the Mental Deficiency Acts. Others wanted the statutory provision to include ascertained as well as certified defectives, but not to be extended to defectives who have never been dealt with under the Acts.

277. We accept that any attempt to draw a distinction between certified and ascertained mental defectives for this purpose would tend in practice to be arbitrary. We also think that it would be unsatisfactory to stop short at cases ascertained by a local authority. We doubt, however, whether Section 8 (1) (b) of the Matrimonial Causes Act, 1950, in fact makes any such distinction. The phrase, "a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1938", can, we think, only refer to the four classes of mentally defective persons defined in Section 1 of the Mental Deficiency Act, 1913. Any defective coming within one or other of these categories may or may not have been dealt with by ascertainment or certification under the provisions of the Acts.

278. We consider that where mental deficiency is put forward as a ground for annulling the marriage the question before the court should be—was the respondent at the time of marriage a mental defective within any one of the four categories of defectives defined in Section 1 of the Act of 1913? We appreciate that there may be border-line cases where the medical profession may find it difficult to say whether a person is mentally defective or not. In such a case, should nullity proceedings be instituted, it would be for the court to decide in the light of the medical evidence whether the respondent was or was not at the time of marriage a mental defective within the meaning of the Section. We have no reason to suppose that such a test is not applied by the court at the present time and we doubt, therefore, whether any change in the present provision is really necessary. To put the matter beyond doubt, however, we recommend that Section 8 (1) (b) of the Matrimonial Causes Act, 1950, be amended by the insertion of a specific reference to Section 1 of the Mental Deficiency Act, 1913.

279. The definition of mental deficiency and the classification of mental defectives are at present under consideration by the Royal Commission on the Law relating to Mental Illness and Mental Deficiency, and the law relating to mental deficiency may be altered in the light of any recommendations which that Commission may make. We think it desirable to say, therefore, that the degree of mental defectiveness which in our opinion justifies annulment of a marriage is that which makes a spouse unfitted for marriage and the procreation of children.

Recurrent fits of insanity

280. In the Matrimonial Causes Act, 1950, recurrent insanity has been bracketed with epilepsy, and the ground is described as "recurrent fits of insanity or epilepsy". It was represented to us that the use of the word

“fits” is inappropriate when applied to recurrent insanity. As it was put to us: “An epileptic fit is, generally speaking, a convulsion, lasting a few minutes; these fits may occur several times a month or several times a day; to say that a patient is subject to recurrent fits of epilepsy is simply to say that he is an epileptic. A ‘fit’ of insanity, on the other hand, can only mean a period during which the patient was mentally ill; recurrent mental illnesses may occur at first at quite lengthy intervals, five years perhaps, or ten, becoming more frequent in later life”².

281. It was also said that the phrase, “subject to recurrent fits of insanity”, covered a wide range of possible cases and that it ought to be made more precise. On the evidence before us we doubt, however, whether this wording has caused any serious difficulty³, and it was recognised by the witnesses that the total number of cases brought upon this ground was extremely small. We do not therefore recommend any alteration, save for the substitution of the words “subject to recurrent attacks of insanity” for “subject to recurrent fits of insanity”.

Epilepsy

282. It was represented to us that there is no justification for singling out epilepsy as a ground of nullity if there is not at the same time provision for cases where one party suffers from one of various other types of grave illness which, it was said, may be just as inimical to the married state. We consider, however, that epilepsy, like insanity, occupies a special place. While it is true that attacks of epilepsy may be of varying degrees of severity, what must be looked to is the effect on the person to whom the epileptic is married. The effects of epilepsy, as manifested in the behaviour of the afflicted person, may be as distressing to the other spouse as those in certain forms of insanity. Further, if a person has married not knowing that he was an epileptic it seems to us right that he should be able to have his marriage annulled, since he may feel that he is unfitted for married life. We therefore consider that epilepsy should be retained as a ground of nullity. We think it more appropriate, however, to use the phrase “attacks of epilepsy” rather than “fits of epilepsy”.

Wilful refusal to consummate the marriage

283. Section 8 (1) (a) of the Matrimonial Causes Act, 1950, provides that a marriage is voidable if it has not been consummated owing to the respondent’s wilful refusal. We have already discussed this ground in Part I (see paragraphs 88–89), where we recommend that a genuinely wilful refusal to consummate the marriage, that is to say, a refusal which does not arise from incapacity, whether physical or psychological, should be a ground of divorce and not of nullity. We therefore recommend that Section 8 (1) (a) of the Matrimonial Causes Act, 1950, should be repealed.

Time-limit within which a petition may be presented

284. As we have said (in paragraph 266), in respect of certain of the grounds of nullity introduced by the Matrimonial Causes Act, 1937, the granting of a decree is dependent upon proceedings having been started within one year from the date of marriage. A number of our witnesses considered that this restriction results in hardship, in that a would-be petitioner may not become aware of the facts in question in time to enable

² Paragraph 13, Paper No. 116, Minutes of Evidence, Thirty-seventh Day (Council of the Royal Medico-Psychological Association).

³ See *Smith v. Smith* (otherwise *Hand*) (by her Guardian), [1940] P. 179.

him to take proceedings. For instance, one spouse may have to go abroad (e.g., while on National Service) without the other, immediately after the marriage.

285. Various suggestions were made for modification of the present time-limit, the two main proposals being (i) that the present provision should be retained, subject to a discretionary power in the court to grant leave to the petitioner to take proceedings notwithstanding that one year has elapsed since the date of the marriage, and (ii) that the period of one year should be retained but that it should run from the time the petitioner first became aware of the facts rendering the marriage voidable. While we recognise that the second proposal has certain advantages we think that a time-limit dating from the marriage should be imposed. Where a marriage has been in existence for years it seems undesirable to introduce the possibility of its being set aside because of the discovery by one party at that late stage of facts which would render the marriage voidable. On balance, we prefer a provision on the lines of the first proposal. Accordingly, we recommend that the court should be given a discretionary power to waive the bar where it is satisfied that there are special circumstances which justify an exception being made.

Bar to relief—artificial insemination

286. It is open to the spouse against whom proceedings for nullity of marriage are brought to plead that by his conduct the petitioner has approbated the marriage. A special instance where this defence may be raised is when the parties have consented to the wife's being artificially inseminated, and subsequently a petition for nullity is brought on the ground of impotence. It has been held that the conduct of the wife in permitting artificial insemination, followed by the subsequent conception of a child, does not necessarily amount to such approbation of the marriage as to warrant the court refusing to grant her a decree of nullity on the ground of her husband's impotence, if there was no intention on her part to acquiesce in the marriage if her husband remained impotent after the birth of a child⁴. Subsequently, the Court of Appeal has said that the test is : "Has the husband or wife (as the case may be) by conduct or overt acts consistent only with such affirmation approbated the existence and validity of the particular marriage, whatever may be its particular attributes?"⁵. It would appear, moreover, that conduct which might amount to approbation will not be so regarded if at the material time the petitioner was unaware that in law he or she would be entitled on the facts to have the marriage annulled⁶.

287. We consider that if the parties have gone to the length of artificial insemination of the wife, whether by the seed of the husband or by the seed of a donor, it is undesirable that either the husband or the wife should afterwards be allowed to claim that nevertheless the marriage should be annulled on the ground of the impotence of one or other of them. Consent to an act which is likely to produce a child of the wife is in our view so fundamental a step that it must be taken to mean that the parties acquiesce in the marriage. Accordingly, we recommend that the fact that the parties to a marriage have consented to the artificial insemination of the wife, with the seed of either the husband or a donor, should be a bar to proceedings by either spouse for nullity of marriage on the ground of impotence.

⁴ *R.E.L. (otherwise R.) v. E.L.*, [1949] P. 211.

⁵ *W. v. W.*, [1952] P. 152, in which case the question at issue was whether, by adopting a child, the parties had approbated the marriage, which had not been consummated owing to the wife's incapacity.

⁶ *Slater v. Slater*, [1953] P. 235.

B. SCOTLAND

288. In Scotland there has been little occasion for the court to draw any distinction between void and voidable marriages. A declarator of nullity of marriage may be obtained on the same grounds as those which render a marriage void in England⁷ (see paragraph 265) and also on the ground of impotency. In the latter case it has been held that the marriage is voidable, not void *ab initio*⁸.

289. We have noted that when steps were taken to bring in a Scottish Divorce Bill in early 1937 the Bill in its initial form contained provisions for introducing new grounds of nullity similar to those subsequently enacted for England and Wales in the Matrimonial Causes Act, 1937. These provisions were withdrawn, without a division, by its sponsor when the Bill was before the Scottish Standing Committee, for the reason that it was preferable for the clauses relating to nullity to be considered at greater length than would have been possible in the course of the passage of the Bill.

290. Some Scottish witnesses supported the introduction in Scotland of the grounds of nullity introduced in England by the Matrimonial Causes Act, 1937. Other witnesses were in favour of the introduction of one or some of these grounds but not of all of them.

The Commission's recommendations

291. We consider that, with the exception of wilful refusal to consummate the marriage (see paragraph 294), the grounds of nullity introduced in England by the Matrimonial Causes Act, 1937, are suitable for introduction in Scotland. These are all instances where, in our opinion, it is unjust to hold a spouse to a marriage contract. We recommend, therefore, that in Scotland a marriage should be voidable on the following grounds:

- (a) that either party to the marriage was at the time of the marriage of unsound mind, or a mental defective within the meaning of Section 1 of the Mental Deficiency and Lunacy (Scotland) Act, 1913, or was suffering from recurrent attacks of insanity or epilepsy;
- (b) that the defender was at the time of the marriage suffering from venereal disease in a communicable form;
- (c) that the defender was at the time of the marriage pregnant by some person other than the pursuer.

In each case the granting of decree should be subject to the proviso that the court is satisfied

- (i) that the pursuer was at the time of the marriage ignorant of the facts alleged;
- (ii) that the action was raised within one year from the date of the marriage, except that where the court is satisfied that there are exceptional circumstances which have prevented the action from being raised within that period it may in its discretion grant decree; and
- (iii) that marital intercourse with the consent of the pursuer has not taken place since the discovery by the pursuer of the existence of the grounds for a decree.

⁷ Subject to qualifications relating to certain irregular marriages contracted before 1940. These, however, do not materially affect the matters here discussed.

⁸ *S.G. v. W.G.*, 1933 S.C. 728; but see *F. v. F.*, 1945 S.C. 202.

292. As we have said (in paragraph 275), we consider that the part of the statute making unsoundness of mind a ground of nullity in England should be re-drafted to make quite clear the class of case to which it is intended to refer. Our observations on that matter are of course applicable to the recommendation we have just made in respect of Scotland.

293. With regard to mental deficiency, we recognise that Section 1 of the Mental Deficiency and Lunacy (Scotland) Act, 1913 (which for this purpose does not differ in any material respect from Section 1 of the corresponding English Act) may be amended in the light of the Report of the Committee on the Scottish Lunacy and Mental Deficiency Laws⁹. Any changes which may be contemplated in England and Wales as a result of the findings of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency will no doubt also be studied in Scotland.

294. It follows from our recommendation that in England a marriage should no longer be voidable on the ground that it has not been consummated owing to the respondent's wilful refusal (see paragraphs 88 and 283), that we are not in favour of the introduction of this ground in Scotland. Those cases of refusal which are not really wilful, but which arise from impotence in a psychological sense, can be dealt with under the common law ground of impotence, as is the present practice.

295. In view of our recommendation for the introduction into Scotland of these new grounds of nullity we have had to consider the position of children born of voidable marriages which are subsequently annulled. If this question had arisen for decision before 1949, it is probable that the court would have applied the common law rule applicable to a child born of a void marriage, namely, that the child is held to be legitimate if one parent was ignorant of the impediment to the marriage. Section 4 of the Law Reform (Miscellaneous Provisions) Act, 1949, provided that any child born of a voidable marriage which is annulled is to be deemed to be legitimate. The Act applied to both England and Scotland. Section 4 of the Act of 1949 has been replaced by Section 9 of the Matrimonial Causes Act, 1950, and has been repealed by the same Act. The Act of 1950 does not apply to Scotland. It would appear, therefore, that Section 4 of the Act of 1949 remains the statutory authority on the matter in Scotland. We are agreed that children of voidable marriages which are annulled should be held to be legitimate but we think that it would now be desirable to replace Section 4, in its relation to Scotland, by a statutory provision having the same effect.

296. We consider that our recommendation with regard to artificial insemination being a bar in England to proceedings for nullity on the ground of impotence should apply also to Scotland and we recommend accordingly.

⁹ Cmd. 6834, 1946 ; see also Cmd. 9623, 1955.

PART III

OTHER REMEDIES

JUDICIAL SEPARATION

THE PRESENT POSITION

297. A decree of judicial separation entitles the innocent spouse to live apart from the other spouse, but the marriage tie is not dissolved. The effect of the decree is permanent unless the party who obtained it takes active steps to put an end to it.

298. In England (by Section 14 of the Matrimonial Causes Act, 1950) "a petition for judicial separation may be presented to the court either by the husband or the wife on any grounds on which a petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for divorce *a mensa et thoro* might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857".

299. Divorces *a mensa et thoro* (which were equivalent to judicial separation) were granted by the Ecclesiastical Courts on the grounds of adultery, cruelty or unnatural offences. It appears that the attempted commission of an unnatural offence (sodomy or bestiality) was regarded as sufficient ground for a wife's petition¹. It would seem, therefore, that by virtue of Section 14 of the Matrimonial Causes Act, 1950, a petition for judicial separation might be presented on the ground of attempted sodomy or attempted bestiality, though such attempts would not be sufficient to found a petition for divorce (under Section 1 (1) of the Act), for which the respondent must have been "guilty of . . . sodomy or bestiality".

300. In Scotland, a decree of separation may be granted by the Court of Session or by the Sheriff Court on the grounds of adultery or cruelty.

RETENTION OF THE REMEDY OF JUDICIAL SEPARATION

301. In England, severe strictures have in the past been levelled against the remedy of judicial separation. Thus, for example, the Gorell Commission said of this form of remedy: "It places the parties in a position in which, while they remained married, they are subjected to enforced celibacy. Such separation has been frequently and strongly condemned, as inadequate to meet the situation, and as productive of immorality, and misery to the parties, both the innocent and the guilty, and detrimental to the interests of the children". While considering judicial separation to be an undesirable remedy, the Gorell Commission was nevertheless prepared to retain it (subject to the modification referred to in paragraph 310) in order to meet the views of those who have conscientious objections to divorce.

302. It must be remembered, however, that the Gorell Commission was looking at a very different situation from that which exists today. The grounds of divorce in England have been considerably extended, and these provide relief in very many cases for which the remedy of judicial separation would then have been the only one available. The Civil Judicial

¹ *Bromley v. Bromley* (1793), 2 Add. 158, n.

Statistics show that at the present time, in the vast majority of cases in which grounds for relief exist, the remedy which is sought is divorce, and not judicial separation².

303. Very few of our witnesses suggested that the remedy of judicial separation should be abolished, although a number of those whose proposals are discussed in later paragraphs considered this form of relief to be undesirable in principle. For our part, we consider it necessary that this remedy should be retained in order to provide relief, where sufficient and appropriate grounds exist, for those who have religious or conscientious objections to divorce. We also consider it desirable that a remedy should be available for an injured spouse which, at the same time, keeps open the door for the possibility of subsequent reconciliation.

PROPOSALS FOR SOME LIMITATION OF THE REMEDY OF JUDICIAL SEPARATION

304. We received a number of proposals designed to effect some limitation of the scope or the permanence of the remedy of judicial separation. Implicit in these proposals is that in its present form judicial separation may impose undue hardship on the spouse against whom the decree was made: for a spouse in electing to obtain a judicial separation instead of a divorce may be moved by unworthy motives, yet the effect is that he or she is entitled to keep the other spouse tied for life and at the same time to refuse a genuine offer by the other spouse to resume married life.

305. We feel considerable sympathy with this viewpoint but, for the reasons given below, we are unable to accept any of the proposals which were put to us.

(1) RESTRICTION ON APPLICATIONS FOR JUDICIAL SEPARATION

306. It was suggested that it should be necessary to apply to the court for leave to take proceedings for judicial separation and that leave should not be granted unless good cause was shown. It was contemplated that as well as religious or conscientious scruples, sufficiently compelling financial reasons, such as loss by a wife of valuable pension rights on divorce, might constitute "good cause". Such a proposal seems to us to be open, firstly, to the practical objection that the discretion proposed would place upon the court the well-nigh impossible task of enquiring into the sincerity or the soundness of the motives of the applicant. Secondly, we think that if, as we recommend, there should continue to be a choice between divorce and judicial separation where adequate grounds of relief exist, it is essentially a matter for the individual who desires relief to decide which form of remedy he should seek, and that it would be wrong (even if it were practicable) to take that choice out of his hands.

(2) REVOCATION OF A JUDICIAL SEPARATION ON THE APPLICATION OF THE SPOUSE AGAINST WHOM IT WAS MADE

307. It was suggested that after a certain period (say, twelve months) had elapsed, it should be open to the spouse against whom the decree of judicial separation had been made to apply for its revocation on the basis that the justification for the remedy had gone because he had repented of his former conduct and was now able and willing to resume married life. This proposal would, it was argued, remove the objection that judicial separation is irrevoc-

² In 1954, 74 decrees of judicial separation were granted in England, as compared with 27,353 decrees *nisi* of divorce.

able so far as that spouse is concerned ; it would largely restrict judicial separation to spouses who genuinely wished to retain their marriage on a proper footing and who were anxious to try to arrive at a reconciliation whenever opportunity offered ; and it would discourage the less scrupulous spouse, for example the wife who from malice sought judicial separation instead of divorce.

308. We considered the proposal very carefully. We are recommending (by a majority) that a magistrates' court in England should have power to discharge a separation order on the application of the spouse against whom it was made, if the court is satisfied that it is no longer reasonable to keep the order in force (see paragraph 1037). At first we thought that it might be desirable to make similar provision for a decree of judicial separation, but, on further consideration, we decided that this would not be right. A separation order is a summary remedy, the purpose of which is to afford immediate protection to the injured spouse. Judicial separation, on the other hand, is an alternative remedy to divorce. If a wife, say, chooses to obtain a judicial separation in preference to a divorce, it seems to us that she must be afforded full security in the protection of the remedy she has chosen and that, if her husband repents of his conduct and wishes to resume married life, it must be left to her to decide whether or not she will take him back.

(3) LIMITATION OF THE DURATION OF A JUDICIAL SEPARATION

309. A proposal designed to achieve the same end as the preceding proposal was that a decree of judicial separation should be granted for a limited period only ; or, alternatively, that the court should have power to set a limit to the duration of a judicial separation. In our view, to impose any limitation on the permanence of this remedy would be tantamount to abandoning it as an alternative remedy to divorce.

(4) THE COURT TO HAVE POWER TO GRANT A DIVORCE INSTEAD OF A JUDICIAL SEPARATION

310. The Gorell Commission recommended (by a majority) that the court should have power, in its discretion and on the application of the respondent to the proceedings, to make a decree of divorce instead of a decree of judicial separation³. This proposal was supported by some of our witnesses. In our view, it would place an extremely difficult, if not impossible, task upon the court. It must be assumed that the applicant, having fully considered the position, has deliberately chosen the remedy of judicial separation in preference to that of divorce. It is difficult to see on what basis the court would then be justified in granting instead a decree of divorce. Further, it would seem that the proposal would be likely to lead to a divorce being granted against the wishes of an applicant who had committed no recognised matrimonial offence. To most of us, this in itself is a conclusive objection. But whatever our views on this aspect of the proposal, we are all agreed that the applicant must be left an unfettered freedom of choice in his remedy.

(5) EITHER SPOUSE TO BE ABLE TO APPLY FOR CONVERSION OF A JUDICIAL SEPARATION INTO A DIVORCE

311. The most far-reaching proposal which was put to us was that after a decree of judicial separation had been in force for a certain period (say, three years) either party should be able to apply to the court for its conversion into a decree of divorce. Under the present law, it is always open to an

³ Cd. 6478, paragraphs 391-392.

applicant who has chosen the alternative remedy of judicial separation subsequently to petition for a divorce on the same ground as that on which he obtained the judicial separation. The purpose of this proposal is, however, to enable the spouse against whom the decree was made to be able to have the marriage dissolved, notwithstanding that the other spouse does not want a divorce.

312. We are all agreed that this proposal should be rejected. It would mean that a person, who, having grounds for divorce, chose instead to take the remedy of judicial separation, would find in the end that he had in fact brought about his divorce. Whatever our views on the principle of permitting divorce against the will of an innocent spouse, we all consider that to allow such a result as a matter of course would destroy the whole basis on which judicial separation is granted, namely, as an alternative remedy to divorce. (Those of us who support the introduction of a new ground of dissolution of marriage, based on seven years' separation of the spouses, do not contemplate that a decree of judicial separation made against a spouse should be a bar to that spouse obtaining a decree of dissolution on the ground of separation if the conditions for granting such a decree exist.)

PROPOSALS FOR CHANGES IN THE GROUNDS OF JUDICIAL SEPARATION

313. While we consider that the remedy of judicial separation should be retained, we think that it should be available only in respect of grounds for which it is a suitable form of relief. In our view there are circumstances where it is right to allow the marriage to be dissolved but where judicial separation is not appropriate. In deciding on what grounds judicial separation should be available, as an alternative remedy to divorce, we have adopted the test of the safety and protection of the injured spouse. From the reported decisions, it would appear that this was the principle that guided the Ecclesiastical Courts in England in granting divorce *a mensa et thoro*. The same considerations have also applied in Scotland⁴.

314. Of the existing grounds of judicial separation in England (see paragraphs 298 and 299), we recommend that adultery, cruelty, rape, sodomy and bestiality should be retained, since a husband or a wife may properly seek to be protected from a spouse who has committed any of these matrimonial offences. Consistently with our recommendation in paragraph 210, we recommend that sodomy and bestiality should be grounds of judicial separation at the instance of husband or wife.

315. With regard to attempted sodomy or attempted bestiality (see paragraph 299), we think it preferable that these should not be grounds of judicial separation. They are not grounds of divorce, and it was not suggested to us that the law should be changed in that respect. It follows that the reference to the grounds on which a decree of divorce *a mensa et thoro* might have been pronounced would disappear from the statute.

316. We recommend that the other grounds of judicial separation in England, namely, insanity, desertion and failure to comply with a decree for restitution of conjugal rights, should be abolished. In none of these cases is there need for a protective remedy. Moreover, with regard to desertion, it seems to us anomalous that a deserted spouse who, having rejected the remedy of divorce, may be presumed to wish to keep the marriage alive, is yet able to obtain a decree the primary purpose of which is to entitle

⁴ See *Fraser on Husband and Wife*, Second Edition, p. 877 (Vol. II, 1878).

him to refuse to take back the deserting spouse, if that spouse desires to return to married life⁵. It may be noted that few judicial separations have been granted on the ground of desertion and (so far as we can ascertain) none on that of insanity.

317. In Scotland, adultery and cruelty are at present the only grounds of judicial separation. We recommend that sodomy and bestiality should also be made grounds of judicial separation in Scotland, at the instance of husband or wife.

318. We have recommended (in paragraph 90) that artificial insemination by a donor without the consent of the husband should be an additional ground of divorce in England and Scotland. We recommend (with one dissentient⁶) that it should also be a ground of judicial separation, since for this purpose it may be regarded as being on the same footing as adultery.

BARS TO RELIEF

319. Those recommendations which we have made in respect of bars to relief and defences (see Part I, Chapters 6 and 7) apply equally to the conduct of the spouses in proceedings for judicial separation.

RESTITUTION OF CONJUGAL RIGHTS : ENGLAND

320. In England, if a husband or a wife satisfies the court that the other spouse has left him or her without just cause and has refused to render conjugal rights, the court will pronounce a decree for restitution of conjugal rights. The decree orders the spouse to return home to the petitioner (or to make a home for the petitioner) within a specified period of time and to render conjugal rights to him or her.

321. The remedy was originally given by the Ecclesiastical Courts, disobedience to the decree at first being punishable by excommunication and later by imprisonment. After 1857 the civil courts took over the jurisdiction. Since 1884, disobedience to a decree has no longer been punishable by imprisonment (or in any other way), but the spouse in default may be ordered to make financial provision for the other spouse. Thus, a husband may be ordered to make periodical payments to his wife and, if need be, to secure the payments; a wife may be ordered to make periodical payments to her husband for his benefit or for the benefit of the children, or to settle part of her property for a like purpose. Until the Matrimonial Causes Act, 1923, enabled a wife to divorce her husband on the ground of adultery alone, it was of advantage to a wife to obtain a decree for restitution of conjugal rights in as much as non-compliance with the decree when coupled with her husband's adultery was one of the grounds upon which she could obtain a divorce. Non-compliance with a decree is still a ground of judicial separation (but see paragraph 316).

⁵ Desertion was made a ground of judicial separation under the Matrimonial Causes Act, 1857. It was not a ground of divorce *a mensa et thoro* in the Ecclesiastical Courts. Sir William Scott (later Lord Stowell) said, of cases of desertion: "... the remedy is the remedy of restitution. It would be absurd to suppose that the law which furnishes that remedy, furnished at the same time another remedy which is totally the reverse of it, and totally inconsistent with it. To say that the Court is to grant a separation, because the husband has thought fit to separate himself, would be to confirm the desertion, and to gratify the deserter;" (*Evans v. Evans* (1790), 1 Hag. Con. 35 at p. 119).

⁶ Lord Keith of Avonholm.

322. It was suggested to us that, since a wife can now apply to the High Court for maintenance on the ground of her husband's wilful neglect to provide reasonable maintenance for her or the children, there is no longer any justification for keeping the remedy of restitution of conjugal rights; there are no steps which the court can take to enforce its order that conjugal rights be rendered and the order is in fact rarely obeyed.

323. Against the abolition of the remedy, it was argued that a wife might be unable to obtain a maintenance order on the ground of her husband's wilful neglect to provide reasonable maintenance and yet would be able to obtain a decree for restitution of conjugal rights and an ancillary order for financial provision. Also, husbands would lose the right to apply for financial provision to be made by the wife for their benefit (or for that of the children). Moreover, it was said to be useful that a spouse can obtain a finding of the court which puts on record the circumstances of the separation, if these are not altogether clear.

324. If opinion had been unanimous against the retention of the remedy, we might have come to the conclusion that there was no justification for keeping it. However, one group in the legal profession is in favour of retention and we think that since that group considers that the remedy still serves a useful purpose, and there are arguments of some weight in support, it should be retained. The number of petitions filed by wives decreased by over one-half in 1950, which was the first year in which it was possible for a wife to bring proceedings in the High Court on the ground of the husband's wilful neglect to provide reasonable maintenance. Since then the number of petitions filed, though small, has remained at a fairly steady figure.

JACTITATION OF MARRIAGE : ENGLAND

325. In England, if a person falsely "boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue", that other person may obtain a decree of perpetual silence in a suit for jactitation of marriage. It is an old remedy, inherited from the Ecclesiastical Courts.

326. Petitions for jactitation are now extremely rare and those presented in recent years⁷ have been prompted by the desire to get a declaration by the court as to the validity of a divorce decree obtained in another country rather than by the need to restrain the respondent from actively claiming a false relationship. It was therefore suggested to us that if the court has power to make declaratory judgments as to status (see paragraphs 908-910), it is unnecessary to retain the remedy of jactitation of marriage. We think, however, that it may on occasion still be useful and that it should remain.

⁷ *Shuck v. Shuck*, [1950] W. N. 264; *Igra v. Igra*, [1951] P. 404.

PART IV

MARRIAGE GUIDANCE AND CONCILIATION

Introductory

327. Starting from the conviction that the nation's well-being depends largely upon the quality of married life amongst its members, we were naturally led to consider the means by which harmony and union, once threatened, could be maintained or restored. Thus the various efforts that are being made to give guidance and promote reconciliation came under review, together with the influence upon them of the divorce law and its administration. Successful marriage and the maintenance of the unity of family life are so important that, where husband and wife have become estranged, an attempt should be made wherever possible to bring them together again.

328. A matter so intimately affected by human personalities must present great variety and complexity. There are cases, no doubt, where a comparatively trivial fault has been magnified beyond all recognition: there are others in which the surface strains and stresses are symptoms of a graver and more deep-seated disharmony. The first task of marriage guidance must be to bring to light the causes of failure, actual or threatened. If these prove to be largely external (housing shortage, unwise relatives and the like), or largely personal (petty selfishness, lack of understanding, sexual maladjustment, failure to have children), there is a reasonable chance that wise and skilled counsel may bear fruit.

329. But marriage guidance has obviously far less chance of success when the malaise is really due to the acceptance of false standards of value and of behaviour in marriage. There is no need to stress their danger to the community, and their seriousness is the greater because they are self-propagating. Children are profoundly affected by the conduct of their parents, and the impressions formed in early childhood and in youth may strongly influence their attitude to the community and to their own future marriages. A chain of events may thus be established in which the shortcomings of the parents will tend to reproduce themselves in the children in their own married life. The tendency to take the duties and responsibilities of marriage less seriously, to which we have referred in paragraph 47, coupled with the fact that marriage can be entered into so easily, in our view goes far to explain why so many marriages are predisposed to break down under the first sign of serious strain.

330. We consider that the removal of this major source of marital unrest can be achieved only by the development of a carefully graded system of education for young people as they grow up, in order to fit them for marriage and family living, and by the provision of specific instruction for those about to enter marriage. By "education" we do not mean merely formal education in school but education in the widest sense. We received a large amount of evidence containing many varying and helpful suggestions as to how best such a programme could be put into effect, and many of our witnesses also urged that such steps should be accompanied by amendment of the marriage laws so as to put a brake upon hasty and ill-considered marriages. In our opinion, the consideration of such matters is not within our terms of reference. All of our witnesses were, however, agreed on

the urgency of the problem and we were left in no doubt that while much valuable work is already being carried out much more needs to be done. We therefore consider that the Government should at an early date set up a suitably qualified body to review the marriage law and the existing arrangements for pre-marital education and training.

331. The necessary change of outlook can be brought about only by long-term measures, and a programme of education and training, however quickly instituted, cannot bear fruit for many years. But there remain the cases we have mentioned which do not stem from so deep-seated a cause. We believe that in these cases marriage difficulties can often be cured with the help of wise counsel. For the sake of these and every case where help can usefully be given it is important to ensure that the means of effecting reconciliation are available. The remainder of this part deals with measures designed to assist reconciliation where a marriage threatens to break down or has broken down already.

The existing facilities for matrimonial conciliation

332. The development of agencies engaged in matrimonial conciliation is of recent origin. Following the marked rise in the number of divorces in the immediate post-war years the need to provide facilities to assist the work of conciliation was increasingly recognised. In 1946 a Departmental Committee, of which Mr. Justice Denning (now Lord Justice Denning) was the Chairman, was set up by the Lord Chancellor with the task of examining "the present system governing the administration of the law of divorce and nullity of marriage in England and Wales"; and *inter alia* of considering "whether any (and if so, what) machinery should be made available for the purpose of attempting a reconciliation between the parties, either before or after proceedings have been commenced". Paragraphs 10-21 of the Final Report of the Committee¹ give an account of the development of agencies engaged in conciliation.

333. Much valuable work has been done, and continues to be done, by private individuals, social workers, clergymen, solicitors, doctors and others in the course of their ordinary duties. As distinct from these, the Denning Committee found that the principal voluntary organisations dealing with problems of marital disharmony were the Soldiers', Sailors' and Airmen's Families Association (which did particularly valuable work in this field among members of the Armed Forces in wartime), the Marriage Guidance movement (now co-ordinated centrally under the National Marriage Guidance Council), the Family Welfare Association and the Catholic Marriage Advisory Council.

334. The principal statutory agency in England is the probation service. When a wife comes to a magistrates' court to apply for a summons for a separation or maintenance order she is commonly invited first to see the probation officer. We understand that quite often a reconciliation may be effected at this stage. The help of probation officers in conciliation may also be called upon at any later stage in matrimonial proceedings in magistrates' courts. The probation officers have, however, now gained the confidence of those among whom they work to such an extent that a very large part of their conciliation work is done as a result of a direct approach by those who are meeting difficulties in their marriage but who have not reached the point of wishing to take proceedings. The scope of the work is shown

¹ Cmd. 7024.

by the fact that in 1954 the probation service dealt with nearly 40,000 matrimonial cases in which both husband and wife were seen and, in addition, over 36,000 cases in which only one party was seen.

335. As regards the voluntary organisations, the Denning Committee found that the need and desire for guidance in marriage problems was such that the existing facilities were fully taxed. Expansion to meet the demands was hampered by lack of funds, and the Committee recommended that a system of grants-in-aid should be introduced to help voluntary bodies engaged in marriage guidance whose work had proved itself of value to the State. Detailed recommendations to this end were made following a review carried out by a Departmental Committee appointed in 1948 by the Secretary of State for the Home Department, under the chairmanship of Sir Sidney Harris, C.B., C.V.O.². The Committee recommended that the Government should for an experimental period provide financial assistance for the National Marriage Guidance Council, the Family Welfare Association and the Catholic Marriage Advisory Council. Such assistance was to meet the entire cost of selection and training of marriage guidance counsellors and was to include a contribution towards expenditure on central administration at the headquarters of each of these organisations. Where local councils, from which the actual work of marriage guidance is carried out, need help from public funds, the Committee considered that local authorities, with the consent of the Minister of Health, would be able to contribute under Section 136 of the Local Government Act, 1948, towards the expenses of local marriage guidance centres: the Committee went on to recommend that in cases where substantial expenditure was involved, this should, if the Home Office were satisfied that the work was being conducted on the right lines, be met by a Government grant to the extent of 50 per cent.

336. Effect was subsequently given to these recommendations, save that in the case of contributions to marriage guidance councils by local authorities, such expenditure does not rank for direct Exchequer grant. The results of our examination of those arrangements are set out in later paragraphs.

337. The foregoing paragraphs relate to conciliation agencies in England and Wales. In Scotland the marriage guidance movement is less fully developed. There are, however, a number of local marriage guidance councils, co-ordinated centrally under the Scottish Marriage Guidance Council. The Scottish Council, which is of more recent formation than the National Marriage Guidance Council in England, is an independent body; at the same time it maintains contact with the English Council and works on broadly similar lines. Local councils operate in Edinburgh and Glasgow and others have fairly recently been set up in Aberdeen, Dundee, Dumfries and Stirling. The Scottish Council receives a Government grant towards headquarters expenditure, and in one or two instances local councils have received grants from local authorities.

338. Unlike probation officers in England and Wales, probation officers in Scotland have no statutory authority to undertake conciliation work. We understand that individual officers do, however, attempt conciliation from time to time where spouses seek their help.

339. Our evidence has shown that in England and Scotland the existing organisations are as yet operating on a limited scale, but the measure of success already attained supports the view that in many cases husband and wife have been able, with the help of skilled counsellors, to overcome their difficulties and to achieve a reconciliation. We consider that further expansion of those facilities is required.

² See the Report of the Departmental Committee on Grants for the Development of Marriage Guidance (Cmd. 7566).

Conditions for effective reconciliation

340. We had much evidence from our witnesses on the conditions which must be realised if husband and wife are to be able to achieve a reconciliation, and we set out below the primary conditions which, in our opinion, have to be taken into account in framing any arrangements to assist in bringing husband and wife together:

- (i) Marital difficulties are much more likely to be overcome if they are tackled in their early stages. Husband and wife are then more likely to be prepared to make the effort required. If matters are allowed to develop into a condition of chronic disharmony, one or perhaps both of the spouses will probably have lost the ability or desire to make any attempt to restore the marriage, and by the time steps have been taken to institute divorce proceedings the prospects of bringing husband and wife together again are greatly reduced. This view won a wide measure of support from our witnesses.
- (ii) Reconciliation must spring from a positive impulse on the part of at least one of the spouses. It is not something which can be imposed on them from without. The task of the counsellor is rather to bring an objective viewpoint to bear on the situation and to try by the use of tact and persuasion to get husband and wife to see their problem in a wider perspective. The aim must be to bring them to reconsider what are their real feelings about the situation, and the problems and possibilities facing them. Once that stage has been reached, the issue rests with the spouses. The majority of our witnesses agreed that any suggestion of compulsion is unlikely to yield successful results. While a limited number put forward proposals which appeared to entail some measure of compulsion, most of them on further consideration made it clear that what they contemplated was that every legitimate effort should be made to persuade husband and wife to try to come together again but that compulsion was likely to frustrate any chance of reconciliation. Most of our witnesses were agreed that various schemes which have been tried in foreign countries, requiring compulsory attendance of parties to a divorce suit before some form of conciliation agency or tribunal, had proved in the end to be a routine and useless formality.
- (iii) Counselling to be successful must take place in a frank and uninhibited atmosphere, so that each spouse may have complete confidence that nothing he says will be disclosed subsequently without his permission. If the counsellor is to get to grips with the real difficulties which have arisen, each spouse must feel free to disclose his troubles with complete candour. This cannot be achieved unless he has a firm assurance that nothing he says will be used to his prejudice in subsequent matrimonial proceedings.
- (iv) The law as to collusion and condonation should be such that it will not act as a deterrent to bringing husband and wife together with a view to reconciliation. Where one of them has ground for divorce he may often fear that any meeting or discussion with the other may endanger his case and thus may be hesitant to make or respond to any approach. And if he agrees to enter wholeheartedly into an attempt at reconciliation he may run the risk, if the attempt should subsequently prove unsuccessful, of being held to have condoned the other spouse's offence. Such fears and doubts may in particular arise to prevent husband and wife coming together where one of

them is in desertion. The deserted spouse may be reluctant to suggest to the other spouse that they resume married life together, as this will end the state of desertion and, if the reconciliation should prove to be only temporary, it would be necessary to wait for a further period of three years before divorce could be obtained. A substantial number of witnesses drew attention to these difficulties. We have found it difficult to suggest suitable remedies, but in another part of our Report we set out various recommendations, approved by a majority of the Commission, which are designed to overcome them (see paragraphs 149, 168, 242 and 246). We recognise that our proposals are not free from difficulty. We submit them because of our anxiety that everything possible should be done to bring estranged spouses together, and we hope that our proposals, difficult of application as they may be, will be put into effect at least for a trial period. Experience of their operation may show that they require amendment.

A possible pattern of future development

341. We have already indicated the importance to society of bringing estranged spouses together. The State has thus an interest in furthering reconciliation wherever possible. We suggest that it would be unwise to attempt to define any formal pattern of conciliation agencies, or to set up an official conciliation service. The State's role should rather be to give every encouragement to the existing agencies, statutory and voluntary, engaged in matrimonial conciliation; as well as to other agencies which may be approved in the future. Voluntary agencies which have proved their worth should receive financial assistance from public funds. Their activities should be widely publicised and their services so developed throughout the country as to make them readily available to everyone. In extending the existing facilities, experiment and diversity of method and technique should continue to be encouraged. Those now engaged on this work would hesitate to say that the methods they have so far evolved are necessarily the best or the only ones which may yield success. In matters involving such intimate and personal problems it is important to maintain as much diversity of pattern as possible, since it is only through a wide experience gained from a variety of sources that the best form and method of approach is likely to emerge.

342. Having suggested the broad lines of possible development we now set out the detailed steps which we recommend as necessary to attain that end.

Financial assistance

(1) ENGLAND

343. Following the recommendations of the Harris Committee (to which we have referred in paragraph 335), Exchequer grants have since 1949 been made towards the central administrative expenditure of the three societies most active in this field. Annual grants (which have continued save for a reduction made in 1951-52 owing to the general policy of the Government of reducing public expenditure at that time) have been made to the National Marriage Guidance Council (£5,000); the Family Welfare Association (£1,500); and the Catholic Marriage Advisory Council (£1,500). In addition, a Marriage Guidance Training Board, composed of representatives of the three societies, and of the Home Office, the Ministry of Health and the Ministry of Education, was set up in 1949 by the Secretary of State for the Home Department with the task of planning and supervising schemes for the selection and training of marriage guidance counsellors to be employed by the three societies, or by organisations affiliated to them. The whole cost of selection and training has been borne by the Exchequer until the financial

year 1954-55, when the grant of £4,000 was supplemented to a small extent by the societies. We recommend that these Exchequer grants towards the central administrative expenditure and the cost of selection and training should continue to be made.

344. In the immediate future we expect that there will be some increase in the number of trained counsellors. Recruitment of additional workers will, however, continue to be limited by the number of persons willing and fitted to undertake marriage counselling. It is recognised by those concerned that over-rapid expansion may endanger the quality of the services provided, and the present emphasis is as much on improving the quality of the existing counsellors through better training as on increasing their numbers. In the next few years such expansion and improvement of training facilities as is desirable should not result in heavy additional expenditure. We recommend that the relatively modest increase in expenditure which will be called for in order to provide better training facilities and to meet any resulting additional expenditure at central headquarters should be met by an increase in the Exchequer grants.

345. We have also considered the longer-term development of conciliation services. While it is not possible to estimate with any degree of accuracy the additional number of local centres required, we contemplate that ultimately each large town would have a marriage guidance centre to serve the surrounding area. There are about 80 local marriage guidance councils which are constituent members of the National Marriage Guidance Council. We understand that the Council contemplates that, to cover England and Wales adequately, this number should be increased to 100-120. The Family Welfare Association operates a Family Discussion Bureau in London and seven area offices in the metropolitan area, while the Catholic Marriage Advisory Council has centres in London and ten other large cities. Some expansion of the work of these agencies may also be expected in the future.

346. Apart from the present lack of a sufficient number of trained counsellors, a further obstacle to the development of local centres lies in the cost of providing paid secretarial staff and office accommodation. Economies can, of course, be made by co-ordination of effort by the various organisations interested and by sharing of office premises. The Harris Committee considered that if financial assistance from public funds was to be provided towards the setting up and running of local centres this could best be done, not by direct grants from the central government, but by grants from the appropriate local authorities. We agree with this conclusion. By establishing a link of this kind with the appropriate local authority the activities of the local marriage guidance centre are more likely to become known to the local community, and the attention and interest of its citizens enlisted. At present local marriage guidance centres may apply to a local authority for financial assistance and the local authority may, with the consent of the Minister of Housing and Local Government, contribute under Section 136 of the Local Government Act, 1948. We understand that in the financial year 1954-1955, twenty-four local authorities received consents under this Section to make contributions ranging from one guinea to £4,850.

347. While such contributions are payable subject to the consent of the Minister of Housing and Local Government, the local authorities do not receive any direct Government grant from the Exchequer. It was suggested to us that the need to obtain the prior approval of the Minister and the lack of direct Exchequer grant are factors which tend to discourage local authorities from giving financial help towards the work of marriage guidance centres. We understand that the requirement of prior Ministerial approval

was considered desirable to ensure that contributions were directed to the support of those organisations whose work was already established on a sound basis and that certain standards were maintained in what was as yet an experimental service. We consider that work in this field is now sufficiently firmly established for that requirement to be removed and that local authorities ought to be entrusted with a fuller discretion in this matter.

348. We understand that it has not hitherto been the practice to allow direct Exchequer grant on contributions made by local authorities under Section 136 of the Local Government Act, 1948, as such expenditure comes within the general arrangements for payment of equalisation grants to local authorities. We consider, however, that financial assistance to marriage guidance agencies is of such importance that local authorities should receive greater inducement to make contributions and that this should be effected, if necessary by the introduction of special statutory arrangements, by providing that all such approved contributions should attract direct Exchequer grant.

349. We therefore recommend that:

- (i) local authorities should be empowered to make contributions without ministerial approval towards agencies engaged in matrimonial conciliation, and that
- (ii) any such expenditure approved by the appropriate Minister should rank for a specific Exchequer grant to the extent of not less than 50 per cent.

(2) SCOTLAND

350. We now consider how far our recommendations in the previous paragraphs should apply to Scotland. The marriage guidance movement in Scotland, being of more recent origin, is not at present as fully developed as that in England and Wales. Development of voluntary agencies of this kind is dependent, in the first instance, on support from private individuals who are prepared to assist in the formation of local councils. Substantial progress has already been made. Local authorities should, however, be encouraged to make financial contributions towards local centres, and we recommend that local authority contributions of this kind should be made on the same terms as those which we suggest (in paragraph 349) should apply in England and Wales. We also recommend that Exchequer grants should continue to be made towards the headquarters expenditure of the Scottish Marriage Guidance Council, as co-ordinating agency: they should also be made towards expenditure incurred on any central training courses established and maintained by the Scottish marriage guidance movement.

351. We have already pointed out that probation officers in Scotland have at present no statutory authority to undertake conciliation work. It was represented to us that this to some extent hampers the efforts of probation officers and makes it more difficult for them to approach spouses with the same degree of authority as their colleagues in England possess. We recognise, however, that in England the work of probation officers in this sphere takes place in the main either as a result of parties being referred to them by the magistrates' courts or on the initiative of spouses themselves, who, if they were to take proceedings, would probably go to those courts. The work has in the first instance developed from the fact that parties attend in person before the magistrates' courts and have thus been encouraged to consult the probation officer, who is in attendance. We appreciate that it may be difficult to devise a similar procedure in Scotland. In the Sheriff

Court the parties do not as a rule attend in person. We recommend, however, that the Secretary of State for Scotland should examine whether arrangements can be devised to enable the services of the Scottish probation officers to be made generally available to assist in conciliation. If such a scheme is found to be practicable, the Scottish probation service should be empowered by statute to undertake conciliation work.

Publicity

352. We have considered how best arrangements can be made to bring the facilities for conciliation to the notice of the public. We are certain that many of those in difficulties are unaware of the facilities available and that many of those who take divorce proceedings have never had in their minds the possibility of seeking the guidance of a skilled counsellor. We have referred to the need for guidance to be offered at the earliest possible stage. We consider that often at present the earliest opportunity of bringing to the notice of parties the facilities available arises when an approach to a solicitor is made, either privately or under the Legal Aid Scheme.

353. We know that solicitors seek to impress on their clients the gravity of the step they are contemplating. We wish to stress, however, the importance of every solicitor having clearly in mind the fact that he has an opportunity for bringing the facilities for marriage guidance to the notice of his clients, many of whom may not have considered the possibility of seeking advice from such sources, or may even not have been aware of their existence. No doubt in all consultations with clients upon matrimonial matters solicitors have fully in mind the desirability of effecting reconciliation, and we do not suggest that anything in the nature of compulsion or pressure should be brought to bear upon the spouses. We do, however, suggest that every solicitor should inform his client at the earliest possible stage of a suitable marriage guidance agency in his area, and the facilities which it provides (assuming that such an agency is operating in that area), unless circumstances exist which in his opinion make it unnecessary or undesirable to do so. In those few cases where the petitioner himself goes to file a petition it should similarly be the responsibility of an official of the court to inform him, in any appropriate case, of the address of a suitable counselling agency. (We recognise that the latter proposal could not be applied in Scotland, since in practice the parties always employ a solicitor.)

354. In the immediately foregoing paragraphs we have had in mind particularly those who have reached the point of consulting a solicitor with a view to the institution of divorce proceedings. We contemplate that the valuable work already being done in the area of the magistrates' courts in England and Wales by the probation officers will continue.

355. A number of our witnesses urged, as a further step to assist in bringing to the notice of people who are in marital difficulties the facilities available to help in overcoming them, that the provisions of the Legal Aid and Advice Act, 1949, and of the Legal Aid (Scotland) Act, 1949, which relate to legal advice, should now be brought into operation. Those in matrimonial trouble would be likely to take advantage of the services afforded by a system of legal advice at an earlier stage in their difficulties, before matters became so serious that they felt it necessary to resort to litigation assisted by legal aid. Thus the solicitor, after explaining the legal position to the client, would be able with a greater chance of success to draw the client's attention to the available facilities for conciliation.

356. We appreciate that financial considerations have hitherto prevented the provision of legal advice as envisaged under the Acts. It is in our view very desirable from the point of view of reconciliation that effect should be given to those provisions as soon as possible, and we recommend accordingly.

Admissibility of evidence of marriage guidance counsellors

357. We have suggested means of strengthening and extending the work of marriage guidance agencies and of encouraging people to seek their help before taking steps to institute divorce proceedings. Such measures will, however, bear full fruit only if the public has confidence in the counselling agencies and in particular is satisfied that nothing disclosed in the course of discussions with a counsellor will subsequently be revealed without the client's consent. At present the court will treat as privileged communications made by husband or wife to a person acting as a conciliator, such as a counsellor, probation officer, doctor or clergyman³. This privilege, however, is vested in the spouses and the conciliator may be obliged to disclose confidences to the court if neither spouse claims privilege. From the point of view of the individual client it may be sufficient if he is assured that he can discuss matters in complete frankness with a marriage guidance counsellor without risk of disclosure. But we think that the interests of those engaged in counselling must also be considered, and unless there is complete freedom in discussion, the whole basis of conciliation may ultimately be destroyed. The great majority of counsellors are voluntary workers. Their task demands special qualities and therefore the number of persons suitable for this work is limited. If marriage guidance counsellors find themselves compelled to give evidence in court in matrimonial proceedings this fact may deter suitable persons from coming forward to offer their services for this work. One experience only by a voluntary worker of rigorous cross-examination in the witness box might well be enough to make him or her decide to abandon conciliation work. Further, the knowledge that if he is unsuccessful in his attempt at conciliation he may be called to give evidence in court is not likely to assist the counsellor in his task; and if there were to be frequent appearances in court of marriage guidance counsellors the public might well lose confidence in the marriage guidance movement, and those in difficulty would become increasingly hesitant to use their services.

358. We think that the considerations to which we have referred cannot be met by anything short of a provision that the evidence of counsellors is not to be admissible in matrimonial cases. We therefore recommend that facts learnt by a marriage guidance counsellor in the course of conciliation work should be inadmissible as evidence in any subsequent matrimonial proceedings between the spouses.

359. In this context, by a "marriage guidance counsellor" we mean a person who has been appointed by a body carrying out the work of marriage guidance to act as a marriage guidance counsellor. We do not think that this recommendation should apply to other persons who may from time to time undertake the work of conciliation, including probation officers and medical specialists and others to whom individual clients may sometimes be sent by a marriage guidance counsellor. These persons are already protected to the extent that they may not give evidence without the consent of the spouses who have confided in them. We have heard no suggestion that this limited privilege has proved unsatisfactory. If our recommendation were not restricted in this way, the number of persons able to claim protection

³ See *McTaggart v. McTaggart*, [1949] P. 94; *Mole v. Mole*, [1951] P. 21; *Henley v. Henley* (*Bligh* cited), [1955] 2 W.L.R. 851.

would be large and the exclusion of evidence on such a scale might well result in preventing a husband or wife from being granted the relief to which he or she was entitled. There is a further reason why the recommendation should not apply to probation officers. These officers are very intimately connected with the work of the court and may be asked by the court to make other enquiries, for instance with regard to custody of the children, at the same time as they are engaged on the work of reconciliation. In such circumstances, if the facts learnt by them in the course of their conciliation work were to be inadmissible in evidence, they might be placed in considerable difficulties as to the evidence which they could properly give on other matters, and in consequence the court itself might be deprived of information which should be available to it.

PART V

CHILDREN

360. Of the problems resulting from the dissolution of marriage none is more serious than that of trying to ensure the future well-being of the children. It is a substantial problem. Each year in Great Britain some 20,000 children under the age of sixteen are affected by the divorce of their parents. To all of us this aspect of our inquiry has been a matter of deep concern.

361. There is a wealth of testimony as to the effects on children of the breakdown of normal family relationships. Where family life breaks down, there is always the risk of a failure to meet fully the child's need for security and affection. If in fact there is such failure, the child may become so emotionally disturbed as to reject the influences of the family and this may result in anti-social behaviour. As was said in the evidence submitted to us by the National Association for Mental Health, "... childhood should be passed in an atmosphere of stability, consistent affection and security where the extremes of neglect and indulgence are excluded. Emotional harmony, warmth and devotion in the home are the greatest factors contributing to good mental health in the adult. For any child to be deprived of such a background can often be shown to have serious effect on his subsequent personal development and mental health out of all proportion to the apparent disturbance".

362. Where divorce takes place it is therefore essential that everything which is possible in the circumstances should be done to mitigate the effects upon the child of the disruption of family life.

363. The present law¹ provides that in any proceeding before any court where the custody or upbringing of a child is in question, the court in deciding that question must regard the welfare of the child as the first and paramount consideration. Where questions relating to children arise as a result of divorce, that principle has to be applied against a special set of circumstances, namely, those in which it has been established to the satisfaction of the court that grounds exist which justify the dissolution of the marriage. It has to be considered whether, against that limiting factor, the present procedure is the best which can be devised to ensure that the welfare of the children is given full weight.

364. Throughout this part of the Report our recommendations are intended to apply (whether in England or in Scotland) only to matrimonial proceedings. They do not extend to applications under the Guardianship of Infants Acts or, in the case of Scotland, to applications for custody by petition to the Inner House of the Court of Session under the *nobile officium*—these being matters which do not fall within our terms of reference.

CHILDREN IN MATRIMONIAL PROCEEDINGS: ENGLAND

365. In matrimonial proceedings in the High Court, the court has a wide general power to make provision for the custody, maintenance and education of the children of the marriage (Section 26 of the Matrimonial Causes Act, 1950). Application may be made for an order (during the proceedings or after a decree has been granted) by the husband or the wife, or by a third party who is interested in the children's well-being. In considering an application, the court must apply the principle stated in paragraph 363.

¹ Section 1, Guardianship of Infants Act, 1925.

TENOR OF THE EVIDENCE

366. We received much evidence from our witnesses (many of whom held widely differing views on other topics) that the present procedure is not such as to ensure that in every instance the most suitable arrangements are being made for the future of the children. Concern was expressed on the following points in particular:

- (i) The court does not deal with the position of the children where no application is made for custody. It cannot be assumed that parents, influenced by strong feelings arising from divorce, are always likely to make the best arrangements for the children. There is at present no guarantee in such cases that the arrangements for the children have been maturely considered.
- (ii) Where an application for custody is unopposed it may be assumed that the court will grant the application. In the absence of any evidence to the contrary, it is indeed difficult to see on what grounds refusal could be justified. Yet the parent making the application may not always be the more suitable to have custody. There may, for instance, have been an understanding between husband and wife that if one of them will release the other by getting a divorce, the latter will allow the successful party to have the children.
- (iii) Where custody is contested between the parties, other difficulties arise. Each of them is anxious to have custody, but it is open to question whether the contest always indicates that the parties are moved solely or even primarily by the desire to safeguard the children's interests. Passions are aroused in divorce and judgments distorted. One party may contest the other's claim to custody from spiteful or selfish motives. The children are then in danger of becoming pawns in the struggle of wills. In circumstances of that kind, the judge in deciding custody may in the end be forced back to the test of which of the parents was the innocent party in the divorce suit.
- (iv) In a contested application for custody the procedure is unsatisfactory in that too much reliance is placed on affidavit evidence, the parties are not usually present and the application may be heard by a different judge from the judge who has tried the main issue.

367. A large number of our witnesses, though not all of those who criticised the present arrangements, considered that the root of the trouble lay in the fact that there is at present no adequate means of ensuring that someone is specially charged to look after the children's interests. The solution which received most support was that the responsibility should be placed clearly upon the court, which should consider the arrangements for the children in every case, whether the question of custody was raised by either or both parties or not. The court could, however, effectively discharge this duty only if it had all relevant information about each case. That information, it was said, would be forthcoming only if the court always had before it an independent report about the circumstances of the home in which it was proposed that the children should live and any relevant information about the past and proposed future arrangements. A number of witnesses considered that to be effective such a system of reporting would require the setting-up of a service of court welfare officers, consisting of trained social workers, throughout the country.

THE COMMISSION'S RECOMMENDATIONS

368. First of all, we think it right to point out that where no application is made for custody in the course of divorce proceedings, often one or other of the parties has already obtained an order for custody in a magistrates' court, and is content to continue to rely on this. The judge is always informed of the existence of such an order, since it is obligatory to set it out in the petition. In such cases, in our opinion, the arrangements which have already been made for the children would not as a rule be affected by the new situation created by their parents' divorce.

369. So far as the criticisms were directed to cases where custody is contested, many of the critics were unaware of the increasing use that was being made of a welfare officer by the court in London. Following the Final Report of the Denning Committee, the experiment was made in 1950 of appointing a court welfare officer to the Divorce Division so that he might assist the court by investigating and reporting on the circumstances of the children as directed. (This is discussed in detail in paragraph 387.) Where there is a dispute over custody in London it seems to us that the judges have the fullest opportunity for obtaining the necessary information on which to base their decision. Although court welfare officers have not as yet been appointed in the provinces, we understand that the services of local probation officers are used in some districts.

370. In the great majority of cases, however, custody is not contested, and then the procedure is such as to allow the judge little opportunity of satisfying himself about the position of the children. (The welfare officer has not so far been used, save in exceptional circumstances, to make enquiries where there is no contest.) Some people think that there are many instances where better arrangements could have been made for the children; other people think that these cases are few; but whether they be many or few it is obvious that steps should be taken to try to prevent their occurrence.

371. It is, however, important to keep the following considerations in mind. Whatever arrangements are devised for dealing with questions of custody of children, the decision must always be ultimately limited by the fact that the parents have separated and are living in separate establishments. The question in almost all cases is that of deciding which of the parents is to be responsible for the child's upbringing, and in which home the child is to live. However unsatisfactory some homes may appear to be, it is generally accepted that such conditions can often co-exist with strong ties of affection between parent and child. The alternative to leaving the child in the charge of the parent would be to try to find a suitable relative or friend who is willing to undertake the care of the child or, failing that, that the local authority should receive the child into care; and it is obvious that conditions would have to be really bad before one of these courses could be justified. Moreover, we consider that in the great majority of cases parents are the best judges of their children's welfare. Where they are agreed upon the arrangements for the children, very strong evidence indeed would be required to justify setting aside their proposals.

372. After a very careful examination of all aspects of the problem of children in divorce proceedings we have come to the conclusion that what is needed is a procedure which, firstly, will ensure that the parents themselves have given full consideration to the question of their children's future welfare, and secondly, will enable the control of the court over the welfare of the children to be made more effective. We think that these two aims are most likely to be achieved by a statutory provision that a divorce cannot be obtained until the court is satisfied as to the welfare of the

children, and we are recommending accordingly. It will be seen that by "divorce" we mean the decree absolute and not the decree *nisi*. We have considered whether it would be feasible to make the granting of a decree *nisi* dependent on suitable arrangements having been made for the children, but we have satisfied ourselves that such a requirement would be administratively impracticable, chiefly because of difficulties necessarily arising from the existence of the circuit system.

Procedure for dealing with children in divorce cases

373. We recommend that it should be provided by statute

- (i) that in every divorce case the court must be satisfied that the arrangements proposed for the care and upbringing of any children² under sixteen years of age are the best which can be devised in the circumstances, and
- (ii) that, until the court is so satisfied, the decree *nisi* must not be made absolute; provided that, if there are exceptional circumstances, the court may allow the decree *nisi* to be made absolute on an undertaking being given by the party who has obtained the decree to bring the question of the arrangements for the children before the court within a specified time.

374. To enable the court to discharge this duty, it is obvious that it must have before it adequate information about the arrangements proposed. We therefore recommend that the petitioner (and, if custody is contested, the respondent as well) should be required to submit to the court a written statement setting out in detail the proposed future arrangements for the care and upbringing of the children. Further, since we contemplate that sometimes the court may be unable to come to a decision on the basis of the statement and evidence, we recommend that provision should be made for investigation and report by a court welfare officer in such cases as the court may direct.

375. We think that it is necessary to give the court power, when there are exceptional circumstances, to allow the decree *nisi* to be made absolute before the question of the children's future has been settled to its satisfaction. The circumstances we have in mind are similar to those which the court takes into account in exercising its present power to expedite the making of the decree *nisi* absolute. The most usual case is where the court is asked to expedite the making of the decree *nisi* absolute to enable a child to be born in wedlock.

376. We consider that the procedure which we propose would have the merit of ensuring that in every divorce case the interests of the children would be an issue before the court and that that issue would be recognised as one which is just as important as the question of divorce. In our view, the recognition of this principle was the underlying aim of the proposals put forward by our witnesses. Not only, however, would the issue of the children's welfare be before the court. The fact that a divorce would not be obtained until there was a satisfactory solution of that issue would bring about a further positive and beneficial result. If the interests of the children were thus placed in the forefront the parents themselves would, we believe, be led increasingly to recognise their responsibility towards their children, and

² We define later (see paragraph 393) the classes of children to which our recommendation applies.

to appreciate that the fact of divorce, far from diminishing that responsibility, makes it all the more important that they should strive to make the best arrangements which they can devise for the children in the new situation created by the dissolution of the marriage.

377. It is this latter consideration—the desirability of bringing home to the parties to the divorce suit their continuing parental responsibility—that has primarily led us to reject the suggestion that investigation should be carried out by a court welfare officer in every case. If this were done, we foresee certain dangers. If a report were always to be required the procedure might in time deteriorate into a perfunctory and routine formality. The impression might be created in the minds of some parents that the decision about the future of their children was largely being taken out of their hands and that their views counted for less than the court welfare officer's report. Their sense of parental responsibility would be diminished, not strengthened. Where the parents were genuinely concerned to do the best for their children (and we believe the majority are) investigation by officials might only cause resentment and frustration, and would be counter to what is most desirable, namely, that the parents should themselves be encouraged to fulfil their responsibilities. As we see it, the main merit of the scheme which we put forward is that it would encourage just such a sense of parental responsibility. And if parents were thus made to realise at the outset their obligations to their children we would hope that they would sometimes decide to abandon the idea of divorce, for the sake of their children.

Detailed aspects of the scheme

378. While we do not propose to attempt to lay down the details of the procedure for the operation of our scheme, we think that we should make some comment on one or two aspects.

379. The Denning Committee recommended that if there were children under sixteen years of age, a petition for divorce (whether it contained a claim for custody or not) should contain a statement about the children, giving their ages and their past, present and proposed homes, maintenance and education³. Effect was for a time given to this recommendation by the Matrimonial Causes Rules, 1947, but the requirement was later dropped because it was found that it did not achieve its object. Details of the children's future home and education were often very sketchily filled in, or completed in the absence of any precise information at all, since it was often impossible at the time of filing the petition to provide definite answers to those questions. Moreover, since the arrangements for the children were not an issue in the case, and since the court had no sanctions to impose, the matter tended to be dealt with perfunctorily, and without careful investigation. If, however, the approval of arrangements for the children is made a condition precedent to obtaining a divorce, as we suggest, they are bound to receive the scrutiny and attention which in our opinion they deserve.

380. The most convenient stage at which the statement should be filed can be ascertained in practice but we do not think it desirable that it should be incorporated in the petition or necessarily filed when the petition itself is filed.

381. We envisage that the petitioner's statement would be served on the respondent and that the latter would have to file a statement and serve a copy on the petitioner if he wishes to be heard on custody. We suggest

³ Cmd. 7024, paragraph 34 (ii), Final Report.

that either party should be able to bring their statements up to date by filing an amended statement and serving a copy on the other party. We see no need for affidavits. But we do not wish to insist on any of these points of detail; the most suitable procedure can be worked out in practice.

382. At the present time (unless there is a contest) applications for custody are dealt with by the judge immediately after he has tried the divorce issue. We think it desirable that all applications for custody (whether contested or not) should so far as practicable be dealt with at this time. Where, however, it is not practicable to settle the question of the proposed arrangements for the children immediately after the trial of the divorce issue, we wish to emphasise that so far as possible the judge who tried that issue should continue to deal with the children.

383. A possible difficulty to which our witnesses referred was that, short of requiring investigation in every case, there were no means of deciding when investigation would be appropriate, and, indeed, it was primarily for this reason that they recommended investigation and report by a welfare officer in every case. We do not consider that that difficulty will arise under our proposal. Usually there is no dispute between the parties over the arrangements for the children. The judge will have before him a written statement by the petitioner which will be sufficiently detailed for him in most cases to assess the soundness of the proposed arrangements. He will be able to put questions to the petitioner on the basis of the statement; normally this should suffice. Sometimes, of course, questioning on the written statement will not prove sufficient. This might happen, for instance, when there is a husband petitioner who does not apply for custody since he is content that the children should remain with the mother. The petitioner has, however, to assume responsibility for the written statement and must be prepared to face questioning on it in the witness box. The burden will thus rest upon him before coming to court to satisfy himself that the respondent is able to look after the children. The ages of the children, their past and present homes, and the nature of the ground of divorce will in addition be relevant, though not in themselves determining, factors. In these circumstances, while we contemplate that the court will sometimes call for a report from the court welfare officer, we see no reason to believe that a report will prove necessary in all, or even in the majority, of such cases. Where custody is contested, greater difficulty may arise, and here we contemplate that a court welfare officer's report will be called for more frequently. The number of such cases should not, however, be inordinate, since there is a dispute over custody in only some five per cent. of the total number of divorce suits in which there are children.

384. It was suggested to us that it was undesirable that custody questions should be largely decided on the basis of evidence given on affidavit. Much of the force of this criticism will be removed if our proposals are given effect. Affidavit evidence by supporting witnesses is often useful in saving expense and we consider that it should continue to be received. If, however, there is a contest on any material point concerning the custody of the children, then that point should as a rule be determined on oral evidence.

A system of court welfare officers

385. We have already explained why, on grounds of principle, we rejected the proposal that a welfare officer's report should always be called for if there are children. Apart from those considerations, we found this proposal unacceptable on practical grounds. It is obvious that if there were to be investigation in every case where there are children a very large number

of officers would be necessary. The benefits achieved would often be negligible and could not justify the expense which such investigation would entail. Even if financial considerations were irrelevant, it is almost certain that sufficient experienced social workers could not be made available to undertake this work.

386. While it is an essential feature of the scheme which we propose that there should be a service of court welfare officers, the demands on it should not in our view be excessive. We see no need to set up a special service of officers to be engaged solely on this work, even assuming that an adequate number could be found.

387. The nucleus of a court welfare service already exists in London (see paragraph 369). Those cases in which the court welfare officer has been asked to make enquiries have so far, with few exceptions, been cases in which the parents do not agree on custody or access. While we contemplate that in future investigation may be called for in certain other cases, the procedure to be followed by the court welfare officer will essentially be the same as at present. The court welfare officer interviews both parents and visits their homes. He sees the children against the background of the home they are living in; if it seems desirable he may talk privately with the children. It is also often necessary to visit head teachers, doctors and clergymen in order to obtain information which may assist the court. The results of these enquiries are set out in a report which is filed with the court and is available for inspection and copying by both parties. The court welfare officer is present when the application is heard and is available to be cross-examined by counsel for either party and to answer any questions put by the judge. The parties are frequently present at the hearing and the judge can then question them.

388. The present court welfare officer is a deputy principal probation officer seconded part-time to the Divorce Division. We have been greatly impressed by the work undertaken by that officer and we understand that the arrangement has worked well. Increasing use has been made by the judges of his services and, with the growth of his work, he has since 1952 had the assistance of two women probation officers. We consider that this has been a valuable development and that these arrangements should be continued and expanded as part of the system of court welfare officers which we recommend.

389. Similar arrangements should be provided in the provinces. We consider that in the provinces the work can best be undertaken by one of the existing statutory services. The use of one service would not only facilitate co-operation between court welfare officers, but would also enable other officers of the service to be called upon to make enquiries on behalf of a court welfare officer. We contemplate that there should be one officer for each of the forty-two towns in England and Wales at which matrimonial cases are tried, who would be designated court welfare officer for the area served by that town, and to whom all directions for reports would be sent by any judge trying divorce cases in that town. The officer would either carry out investigations himself or arrange for them to be carried out by other officers of the same service in the area; and where necessary he would be empowered to call upon his colleagues in other areas to carry out investigations where the parties or one of them lived in another part of the country.

390. We consider that the only existing statutory services which can suitably provide a network of this kind are the probation service and the children's service. We have already said that there is advantage in confining the work to a single service, and we recommend that the probation service should be selected. We appreciate that often officers of either service would

be equally suitable, but the balance of advantage seems to us on the whole to lie with the probation service, since the work is more closely allied to much of the probation officers' present duties. The probation service has more experience than has the children's service of proceedings in the magistrates' courts bearing on the custody of children, and of attendance at the higher courts.

391. The arrangements outlined would ensure that the network of the probation service would be available to assist the court in dealing with the position of the children. In most areas there would be no need for the designated officer to be employed full-time on such duties, and in general we see no reason why the work should not be carried out by the probation service concurrently with its existing duties.

Additional recommendations

392. Having set out in some detail the principal features of the scheme which we recommend for dealing with the position of children in divorce cases, we now put forward a number of additional recommendations.

(1) CLASSES OF CHILDREN TO WHICH THE SCHEME SHOULD APPLY

393. The court's jurisdiction at present extends to legitimate or legitimated children of the two spouses and adopted children of the two spouses. We consider that it should also extend to the following additional classes of children:

- (i) illegitimate children of the two spouses⁴;
- (ii) children of either spouse (including a child adopted by either spouse), if living in family at the time when the home broke up;
- (iii) illegitimate children of either spouse, if living in family at the time when the home broke up;
- (iv) other children (excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up.

The children in class (i) are those who cannot under the present law be legitimated because their parents were not free to marry at the time of their birth. The fact that the children cannot be legitimated should not have the effect of excluding them from the scope of our proposal. The children in classes (ii), (iii) and (iv) have been taken into the family and it is their home which has been broken up in consequence of the matrimonial dispute between the spouses; the latter should not be allowed to disclaim the responsibilities assumed when the children were taken into the family.

394. We accordingly recommend that:

- (i) The proposal in paragraph 373 that before the decree *nisi* is made absolute the court should be satisfied as to the arrangements for the future of the children should apply to the additional classes of children set out in paragraph 393, as well as to the children of the marriage.
- (ii) The court should have power to make an order for custody in respect of children in these additional classes.

⁴ Since the Report was drafted, the House of Lords has held that the court has power under Section 26 (1) of the Matrimonial Causes Act, 1950, to make an order in respect of the illegitimate children of the two spouses (*Galloway v. Galloway*, [1955] 3 W.L.R. 723). The Court of Appeal had already held that the court can make an order in respect of children born of a marriage which has been declared null and void (*Bryant v. Bryant*, [1955] 2 All E.R. 116).

(2) POWER TO REQUIRE A LOCAL AUTHORITY TO RECEIVE A CHILD INTO CARE

395. Sometimes (though, we think, infrequently) the conditions in which it is proposed that a child should be brought up may be so unsatisfactory that the court will decide that the child should not be placed in the care of the spouse who is asking for custody. The other spouse may be equally unsuitable or may be unable to look after the child. The only course then open to the court would be to give the care of the child to a third party; although conditions would have to be really bad before that course could be contemplated. In such circumstances the best person to assume the care of the child would clearly be a relative, if he or she is considered suitable and is willing to take the child. But this solution will not always be possible, and then the alternative is that the child should be received into the care of a local authority. We therefore recommend that the court should have power to require a local authority to receive a child into its care. After the court has made an order in the exercise of this power, a spouse (or any other person) should not be able to get the child back without an order of the court.

(3) SUPERVISION AFTER AN ORDER FOR CUSTODY HAS BEEN MADE

396. Some witnesses recommended that whenever an order for custody is made the children should be placed under the supervision of a welfare officer for such time as the court might direct; others contemplated that supervision would on occasion be necessary. We recognise that there may be some cases where it is desirable that the arrangements for custody should be reviewed by the court after a period. In other cases there may be a change of circumstances which makes this necessary. On the other hand, it is obviously important that the children should not feel insecure as to their future. We think, too, that it is insufficiently appreciated that the present law provides for review of the arrangements, since it is open to either of the parties to apply at any time for variation or discharge of a custody order. To that extent the need for continuing supervision is reduced. No doubt there may be cases where the court itself will think it expedient that there should be some measure of supervision by a welfare officer, so that arrangements may be reviewed if necessary; indeed, we understand that at present the court sometimes asks the welfare officer to see the children from time to time. The scheme which we have put forward envisages, however, that the initial arrangements will be fully considered at the time of the divorce, and if sufficient care is taken over those arrangements continuing supervision should not often be necessary. To provide for exceptional cases, however, we recommend that the court should have power, on making an order for custody, to place the children under the supervision of a welfare officer for such time as it thinks fit. So that this provision should be made effective, we recommend that if supervision has been ordered the court should have power to re-open the question of custody at any time on its own motion. We do not contemplate that the supervision would be of a formal kind. What we have in mind is that the welfare officer would visit the home from time to time, and it would be open to him to report to the court at any time. Supervision need not be confined to officers of the court welfare service. The probation service or the children's service would be equally suitable for this purpose. The important thing is that supervision should be carried out by an officer stationed near the child's home.

(4) POWER TO ORDER SEPARATE REPRESENTATION OF CHILDREN

397. It was suggested by some of our witnesses that the children should always be separately represented. In the light of the proposals which we have already put forward we consider this to be unnecessary. Nevertheless, we recognise that sometimes when custody is in issue it may be desirable that the children should be separately represented, and we consider that the court should, where it thinks fit, be empowered so to order. The recommendation which we are making in paragraph 927 will enable the court to do this.

(5) APPLICATION OF OUR PROPOSALS TO OTHER MATRIMONIAL PROCEEDINGS

398. The arrangements for the children are of equal importance where the marriage is annulled or where a separation, of a more or less permanent character, is recognised by a decree of judicial separation granted by the High Court. We therefore recommend that the procedure described in paragraphs 373-391 should apply also to proceedings for nullity and judicial separation. The court should also have the additional powers referred to in paragraphs 393-397.

399. Where a marriage is void *ab initio*, it might at first sight seem inconsistent with that situation to allow the decree absolute to be withheld until satisfactory arrangements have been made for the children. The withholding of the decree cannot, of course, alter the fact that the union entered into was void from the outset. The parties have, however, come to the court in order that full recognition should be given to their legal position by means of a decree of the court and it seems to us reasonable to require that that decree should not be made absolute until the court is satisfied as to the arrangements for the children. Viewed in this way, the position in nullity cases does not present any essentially different features from those where a ground of divorce has been established.

400. With regard to judicial separation, since there is no decree *nisi* the granting of the decree itself will be dependent on the court being satisfied as to the proposed arrangements for the children. The difficulties to which we have referred in paragraph 372 may arise, but we think that, since the number of cases will be very small, it should be possible to meet these difficulties.

401. The court has at present power to make an order for custody after disobedience to a decree for restitution of conjugal rights. We do not suggest that our recommendation in paragraph 373 should apply to proceedings for restitution of conjugal rights since it would be obviously inappropriate. We consider, however, that the additional powers referred to in paragraphs 393-397 should be extended to such proceedings. We of course contemplate, too, that the services of the court welfare officer should be available to the court.

(6) POWER TO MAKE AN ORDER IN RESPECT OF THE CHILDREN WHERE A DECREE HAS BEEN REFUSED

402. Where a petition for divorce, nullity or judicial separation is unsuccessful, the relationship between husband and wife will nevertheless often have failed, and they may have decided to live in separate establishments. In such cases the parties may not agree on the future arrangements for the children. The Divorce Division has, however, no jurisdiction to deal with custody in these circumstances. An application for custody has to be made under the Guardianship of Infants Acts, either to the Chancery Division

or to a court of inferior jurisdiction ; or the child may be made a ward of court. It would, however, sometimes be convenient if the issue of custody could be dealt with by the judge who has tried the main issue in the matrimonial proceedings. If the suit has been defended, the judge will usually have been taken very fully into the circumstances of the parties and of the children. We therefore recommend that where in proceedings for divorce, nullity or judicial separation, the court has refused a decree it should have power, on the application of either party, to make an order for custody. The court should also have the additional powers referred to in paragraphs 393-397. We appreciate that, where the matrimonial proceedings have been unsuccessful, there may be some chance of husband and wife becoming reconciled, and that if the court proceeds immediately to deal with custody that chance may be very much lessened. However, that is a factor which can be taken into account by the judge who deals with the application for custody.

(7) POWER TO MAKE AN ORDER IN RESPECT OF THE CHILDREN IN PROCEEDINGS UNDER SECTION 23 OF THE MATRIMONIAL CAUSES ACT, 1950

403. We consider that it would also be desirable for the Divorce Division to have power, on the application of either party, to make an order for custody when the court has made an order for maintenance under Section 23 of the Matrimonial Causes Act, 1950 ; and we recommend accordingly. The court should also have the additional powers referred to in paragraphs 393-397.

(8) SPECIAL LIST OF DIVORCE CASES IN WHICH THERE ARE CHILDREN

404. As a further means of bringing home to the parties that they are in a special position by reason of the fact that they have a continuing parental responsibility, we recommend that divorce cases in which there are children under sixteen years of age should be placed in a special list of causes for hearing. We appreciate that this provision might prove impracticable in the provinces, and we therefore confine our recommendation to cases to be tried in London.

Access

405. Throughout this part of the Report, where we have referred to questions relating to children, we have intended that phrase to include not only the considerations which arise as to which parent should have the custody of the child but also those arising, where custody is granted to one parent, as to the extent to which the other parent should have access to the child. A number of our witnesses expressed some uneasiness about the granting of access. Some felt that in certain instances it might be inadvisable to grant access to the parent not having custody and that sometimes a complete break with one parent might be better for the child. They were concerned lest the granting of access might result in the undermining of the authority of the parent having custody or lest the shuttling of the child between two hostile parents might create serious mental stress for the child.

406. These witnesses were unable to suggest any specific means of meeting the difficulties and they agreed that the question of access could only be decided according to the circumstances of each case. They also appreciated that it would often be in the child's interests that it should be in touch with both its parents.

407. We certainly do not wish to minimise the difficulties arising in deciding questions of access, but these difficulties are the result of the break-up of the home, and no change in the law can cause them to disappear. We

have, however, recommended that the court should be able to order supervision in any case where it considers this appropriate, and, as we have pointed out, it is at present open to either parent to apply for a review of the arrangements for the children at any time. As to the principles on which custody and access are determined, we would repeat that under the present law the court is bound to regard the welfare of the child as the first and paramount consideration.

Procedure for dealing with children in matrimonial cases in magistrates' courts

408. We now turn to consider how far the proposals we have made should apply in magistrates' courts. Relatively few of our witnesses referred to the handling of custody and access questions arising in matrimonial proceedings in magistrates' courts; some of those who did so drew attention to certain advantages in the procedure followed by those courts in dealing with custody questions. Matrimonial cases are always dealt with in closed court and, even where there is no dispute over custody, both parents are usually present. The court can call upon a probation officer to make a report if this is thought to be necessary.

409. Matrimonial cases in magistrates' courts are dealt with by a summary procedure and it is of the essence of this system that relief should be quickly and readily available. To introduce the possibility of delay by providing that the granting of a separation or a maintenance order should be dependent on the court being satisfied about the arrangements for the children would be contrary to the present principle on which the magistrates' courts operate. Moreover, in many cases the orders granted are of a temporary character. Parties often succeed in overcoming transient difficulties and resume a normal married life. The situation facing the court is therefore vastly different from that prevailing in divorce cases, where matters have become so serious that the issue has become that of the final dissolution of the marriage. For those reasons, therefore, we are against applying in magistrates' courts the procedure proposed for the High Court, namely, that relief should not be granted until the court is satisfied as to the arrangements for the children. Consequently, our recommendation regarding the submission of a written statement on the proposed arrangements for the children, being ancillary to the first proposal, should apply in the High Court only, and not in magistrates' courts. The use of written statements of the kind proposed would clearly be impracticable in many cases in the lower courts, as well as being inconsistent with the summary procedure at present followed.

410. We do, however, consider that, of the proposals previously discussed in relation to the High Court, those mentioned in paragraphs 393 and 396 could usefully be extended to magistrates' courts, and we therefore recommend that:

- (i) a magistrates' court should have power to make an order for custody under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, in respect of:
 - (a) illegitimate children of the two spouses;
 - (b) children of either spouse (including a child adopted by either spouse), if living in family at the time when the home broke up;
 - (c) illegitimate children of either spouse, if living in family at the time when the home broke up;

(d) other children (excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up ;

- (ii) a magistrates' court should have power to order continuing supervision for such period as it thinks fit, after an order for custody has been made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949. Where supervision has been ordered, the court should have power to re-open the question of custody at any time on its own motion.

411. We also recommend that a magistrates' court should have power to award custody of a child to either parent or to a third party (including a power to require a local authority to receive the child into its care), when an application for custody is made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949. At present a magistrates' court cannot award custody to a third party, nor can it award custody to the husband where the wife is applying for a separation or maintenance order.

412. As we have said, magistrates' courts at present have the assistance of probation officers to undertake investigations in connection with custody questions. It has been suggested to us that there may be no statutory authority for probation officers to undertake custody enquiries as directed by the magistrates' courts. Should this be so, we recommend that the matter should be put right by statutory enactment.

CHILDREN IN MATRIMONIAL PROCEEDINGS: SCOTLAND

413. We now consider how far the proposals which we have made for dealing with children in matrimonial proceedings are appropriate to Scotland. Relatively few of our Scottish witnesses submitted proposals for revision of the present arrangements in Scotland for dealing with custody questions. When questioned orally, however, a number of them agreed that the existing arrangements were not entirely satisfactory. In essence, the main criticisms which were advanced against the present procedure in the High Court in England may be applied to that operating in the Court of Session and the Sheriff Court.

Procedure in the Court of Session

414. The considerations which have led us to put forward a number of recommendations for improvement of the procedure in the High Court in England apply equally to Scotland. In particular, we recommend that:

- (i) It should be provided by statute

(a) that in every action of divorce, nullity or separation the court must be satisfied that the arrangements proposed for the care and upbringing of any children of the marriage or any other children (as defined in paragraph 393), under sixteen years of age, are the best which can be devised in the circumstances, and

(b) that until the court is so satisfied decree must not be granted ; provided that, if there are exceptional circumstances, the court may grant decree on an undertaking being given by the pursuer to bring the question of the arrangements for the children before the court within a specified time.

- (ii) In every case, the pursuer should be required to submit to the court a written statement setting out the proposed arrangements for the care and upbringing of the children. The statement might conveniently be set out in the condescendence of the summons or in a separate minute at the same time as steps are taken to enrol a motion to allow the case to proceed for proof; and the pursuer could be allowed to amend or otherwise bring up to date the statement of the arrangements proposed at any time thereafter up to the hearing of the case. If custody is contested, the defender should submit a similar statement, which could likewise be amended or brought up to date.
- (iii) The court should be empowered to obtain reports from welfare officers under the machinery referred to in paragraph 416; this could be done when proof is allowed or at any later time which the court thought appropriate.

415. There is no decree *nisi* in Scotland, but the difficulties to which we have referred in paragraph 372 do not arise, since all actions of divorce and nullity are tried by the Court of Session in Edinburgh.

416. It is an essential feature of the scheme which we propose that there should be available to the court a service of welfare officers to undertake, as directed, investigations into the arrangements proposed for the children. We therefore recommend that in the area of each county council or town council of a "large burgh" in Scotland a welfare officer should be designated, to whom a remit could be made by the Court of Session where a report was called for in respect of any case arising in his area. Such an officer, who should be a member of an existing statutory service, would be entitled to call upon the assistance of his colleagues in that area, or, as necessary, in other areas. We have considered whether it would be practicable in Scotland to assign those duties to the probation service. We have already recommended that this should be done in England and Wales, but we understand that the Scottish probation service has had less experience of this type of work than have officers of the English service, who already undertake conciliation work and custody enquiries in magistrates' courts. Moreover, not every probation area in Scotland at present supports a full-time salaried probation officer. It may be, therefore, that in the immediate future there would be difficulties in assigning the duties we propose to the probation service in Scotland. We recommend in general terms that the welfare officers should be drawn from an existing statutory service or services, and we suggest that the Secretary of State for Scotland, after consultation with the Lord President of the Court of Session, should decide how best effect can be given to this recommendation.

417. While certain of the provisions which we have recommended for England and Wales are either inappropriate to, or are met by, existing Scots law, we think that some extension of the court's jurisdiction would be desirable. We therefore recommend that the Court of Session should have power in proceedings for divorce, nullity or separation:

- (i) to make an order in respect of children in the additional classes set out in paragraph 393;
- (ii) to award custody to a third party (including a power to require a local authority to receive a child into its care);
- (iii) on making an order for custody, to place the children under the supervision of a welfare officer or other suitable person for such

time as it thinks fit; if supervision has been ordered, the court should be able to re-open the question of custody at any time *ex proprio motu*;

- (iv) on the application of either party, to make an order in respect of the children where decree has been refused.

418. At present the court has no power to make an order dealing with the children in an action for adherence. We think that where the defender is in default in obedience to a decree of adherence, the court should be able to make an order in respect of the children, on the application of either party. In making such an order, the court should have the powers referred to in sub-sections (i), (ii) and (iii) of paragraph 417.

Procedure in the Sheriff Court

419. The Sheriff Courts at present have power to entertain actions of separation and aliment, and adherence and aliment. We consider that the proposals which we have made in paragraph 414 for dealing with children in matrimonial proceedings in the Court of Session should also apply where there are children in actions of separation in the Sheriff Courts, and we recommend accordingly. We also recommend that the proposals in paragraphs 417 and 418 should be extended to the Sheriff Courts.

REMOVAL OF CHILDREN OUT OF THE COUNTRY: ENGLAND AND SCOTLAND

Preventing removal of children

420. There have been several instances recently where a spouse has taken the children out of the country before the court has decided an issue as to their custody. It was suggested by the General Council of the Bar of England and Wales⁵ that where a claim for custody is made in matrimonial proceedings in the High Court, a spouse who removes the children from the control of the other spouse, unless by consent or in pursuance of an order of the court, should be deemed to be in contempt of court and in consequence liable to be imprisoned. It was further proposed that either spouse should be able to apply to the court, without notice to the other, for an order placing the children on a "stop list" to be kept by the appropriate authorities, who would then take such steps as were necessary to prevent the children being taken out of the country in contravention of the order.

421. We think it undesirable that the removal of children in the circumstances described should automatically amount to contempt of court. It may well be in their best interests that they should be taken away from the person in whose charge they are.

422. We appreciate, however, that a spouse who is claiming custody of the children may be apprehensive that they will be taken out of the jurisdiction of the court as soon as it becomes known that the court is to be asked to make an order for their custody. This is the moment of greatest danger. It was suggested to us that it should be possible for a spouse to be able to apply to the court at any time after the filing (not the service) of the petition and without notice to the other spouse (or to the person having control of the children) for an injunction prohibiting the spouses or any other person from taking the children out of the jurisdiction, or from the control of their existing custodian, without leave of the court. The effect of the injunction would simply be to continue for the time

⁵ Paper No. 5, 'Minutes of Evidence, Second Day.

being the *status quo* as to the care and control of the children. The court would, of course, have to be satisfied that there was a *prima facie* need for the injunction.

423. It seems to us that this would be the best solution for a difficult problem. Accordingly, we recommend that on or at any time after the institution of matrimonial proceedings in the High Court in England or in the Court of Session or Sheriff Court in Scotland, either spouse, or the guardian of any children in respect of whom the court has jurisdiction to make orders in the course of such proceedings (see paragraph 393), or any other person who has, or who wishes to obtain, the custody or control of such children under an order of the court, should be able to apply *ex parte* to a judge for an injunction or interdict to prohibit the removal of the children out of the jurisdiction, or from the control of the person in whose charge they are, without an order of the court⁶.

424. In England, there is already machinery in existence designed as far as possible to prevent children being taken abroad in contravention of an order of the court. We consider that it should be possible to notify the granting of an injunction or interdict under our recommendation in the previous paragraph to the appropriate authorities under this system. We understand that there is at present no such machinery in Scotland, and we recommend that it should be introduced.

Enforcement of an order for custody

425. It was pointed out to us by a Scottish witness that while the Maintenance Orders Act, 1950, has given the court in Scotland jurisdiction to grant an order for custody notwithstanding that the defender is resident in England, it has made no provision for the enforcement of the order in England; whereas in conferring a similar jurisdiction in respect of orders for maintenance the Act has provided for their enforcement in the other country. It was suggested that we should consider whether it would be advisable that orders for custody should also be enforceable in the other country. As things are, if the wife, for instance, has taken the children to England in contravention of an order of the Scottish court awarding their custody to the husband, he will usually have to take fresh proceedings in England and the whole matter will be reviewed again⁷.

426. The principle followed by the English and Scottish courts is that in questions of custody the welfare of the child is the paramount consideration, even prevailing over the order of a foreign court of competent jurisdiction⁸. We appreciate the importance of this rule. Nevertheless, in our opinion its strict application may lead to hardship and does not appear to us to be necessary when the countries concerned are so closely connected as England and Scotland. We consider that if, for instance, the custody of the children is put in issue in the course of matrimonial proceedings in England, a spouse should not be able to render the decision of the court a nullity by taking the children out of its jurisdiction into Scotland. Instead of having to take fresh proceedings in Scotland, the person who is awarded custody by the English court should be able to enforce his or her order in the Scottish

⁶ While agreeing with the general idea and purpose of this recommendation Lord Keith of Avonholm doubts whether it will be effective under the law and practice of Scotland except where the application is made by the parent or legal guardian of the children.

⁷ The Scottish court may issue an order recommending to magistrates in England and elsewhere that they should give their aid in carrying into effect a warrant to take into custody the person of a child, who is the subject of an application or an order for custody; see *Muir v. Milligan*, 1868, 6 M. 1125; *Marchetti v. Marchetti*, 1901, 3 F. 888.

⁸ *McKee v. McKee*, [1951] A.C. 352. See also *In re B's Settlement*, [1940] Ch. 54; *M'Lean v. M'Lean*, 1947 S.C. 79.

court, which should as a matter of comity recognise that the circumstances had been enquired into fully by the English court. The same principle should apply in respect of an order for custody made in Scotland. The circumstances may, however, be quite different when the children have been away for some time (say, for a year or more) from the country in which the order was made ; it would then be proper for a fresh enquiry to be made in the country which has been the children's home during that time.

427. Accordingly, we recommend that an order awarding the custody of children to a spouse or to some third person, made in the course of matrimonial proceedings in the High Court in England or in the Court of Session or Sheriff Court in Scotland, should be enforceable in Scotland or England, as the case may be, without further enquiry within a period of one year from the date when the children were last in the country in which the order was made ; during that period an application relating to the custody of the children should be made only to the court which granted the original order ; after that period has elapsed, any court of either country should, if competent to assume jurisdiction, be able to entertain an application relating to the children and should have a complete discretion to make such order as it thinks fit.

428. We have expressly limited the application of our recommendation to matrimonial proceedings in the High Court or in the Court of Session or Sheriff Court. To extend it to matrimonial proceedings in magistrates' courts in England would in our opinion raise difficult questions arising from the fact that the courts of both countries may have a concurrent jurisdiction. We also appreciate that this problem of enforcement of orders for custody is not confined to matrimonial proceedings but extends to other types of proceedings, such as, for instance, applications under the Guardianship of Infants Acts. A consideration of these matters is not within our terms of reference.

PART VI

DAMAGES AND COSTS

DAMAGES

A. ENGLAND

429. At common law a husband could claim damages in an action for criminal conversation from the man who was alleged to have committed adultery with his wife. Actions for criminal conversation were abolished by the Matrimonial Causes Act, 1857, Section 33 of which, however, gave a husband the right to claim damages from an adulterer in a petition either for divorce or for judicial separation or for damages only. It was provided that such claims should be tried on the same principles as actions for criminal conversation had previously been tried at common law. No material change has since been made in the court's jurisdiction, which now rests on Section 30 of the Matrimonial Causes Act, 1950. A wife has no similar right to claim damages from the woman with whom her husband has committed adultery. She may bring an action for enticement at common law against the woman, but the burden of proof upon her is very heavy.

430. It is a settled rule that damages for adultery are compensatory only, and that exemplary or punitive damages are not permissible¹. The husband is entitled to compensation for the loss of his wife and for the injury to his feelings and the hurt to his family life. Factors to be taken into account in assessing the loss of the wife are her fortune, her assistance in the husband's business, her capacity as a housekeeper and her ability in the home, and her character and conduct generally¹. In assessing the injury to the husband's feelings the court would take into account the resentment of a poor man whose wife had been seduced by means of the co-respondent's wealth.

431. Although the assessment is on a compensatory basis, the petitioner cannot claim the damages for his own benefit as of right once the award has been made. The co-respondent is usually ordered to pay the damages into court; after the decree *nisi* has been made absolute, the petitioner may apply to the court for their apportionment. On the application the court has a complete discretion how the damages are to be applied and may direct that the whole or any part be paid to the petitioner or settled for the benefit of the children or as a provision for the maintenance of the wife.

432. The present law was criticised on the ground that it affords a vindictive husband an opportunity for revenge and that it is out of touch with accepted views in requiring the court to assess a wife's value in terms of money. But for the most part the witnesses considered that the court should still have power to order a person who has contributed to the break-up of the marriage to make redress in some way for the wrong done. Some proposed that the remedy of damages should be retained but that, in assessing the amount, the court should not award compensation for the loss of the wife's services. Others suggested that the remedy should be abolished and that the court should have power instead to order the adulterer to pay maintenance for either spouse or for the children of the marriage. Those who wished the remedy to be retained proposed that a wife should be given the right to claim damages from the woman with whom her husband has committed adultery. One body suggested that only in a petition for divorce should it be possible to claim damages.

¹ *Butterworth v. Butterworth and Englefield, etc.*, [1920] P. 126, where the question of damages for adultery is fully reviewed.

433. We consider that circumstances do arise in which it is reasonable that an adulterer should be compelled to make redress but we do not think that this should take the form of an obligation to provide maintenance, for an indefinite period, for the husband or the wife or the children of the marriage ; this would introduce into the law an entirely new, and in our view undesirable, principle. We prefer that, as at present, the adulterer should be liable to pay damages. Their compensatory nature and the fact that the court has a complete discretion in directing the application of the sum awarded ensures that a claim by a husband is kept within reasonable bounds.

434. We consider, however, that a wife should now be given the same right to claim damages from an adulteress as her husband has to claim them from an adulterer, and we recommend accordingly.

435. We can see no good reason for limiting the right to claim damages against an adulterer or an adulteress to a petition for divorce.

B. SCOTLAND

436. A husband is entitled to claim damages against a man who has committed adultery with his wife. It is not clear, however, whether a wife has a similar right against a woman who has committed adultery with her husband. We think that she should have such a right and we recommend accordingly.

437. A pursuer who claims damages against the co-defender has to prove that the latter knew that the defender was a married woman at the time of the adultery. We think that instead the burden of proof should be placed on the co-defender to show that he did not know at the time that the defender was a married woman. We are proposing that this change should be made with regard to a claim for expenses against a co-defender (see paragraph 464) and there should be no distinction in this respect between a claim for damages and a claim for expenses. We accordingly recommend that when the adultery alleged has been established, it should be presumed that the co-defender committed that adultery with the defender in the knowledge that she was a married woman until the contrary has been proved. The same presumption should arise when a claim for damages is made by a wife.

COSTS

LIABILITY FOR COSTS AS BETWEEN HUSBAND AND WIFE

THE PRESENT POSITION : ENGLAND

438. The costs of proceedings in the Supreme Court are normally in the discretion of the court, which has full power to determine by whom and to what extent they are to be paid (Section 50, Supreme Court of Judicature (Consolidation) Act, 1925). It is a rule of practice that the successful party will not be required to pay the unsuccessful party's costs and will usually be awarded his own costs. In matrimonial proceedings, however, the wife has been, and to a lessening degree still is, a privileged suitor against her husband. Whether petitioning or defending, she may apply for security for her costs of the suit and, in appropriate circumstances, the court will order the husband to pay a sum of money into court, or to give security, in respect of part or the whole of her estimated costs. If she is unsuccessful at the trial she will seldom be ordered to pay her husband's costs and she

will often be awarded her own costs up to, or sometimes beyond, the sum lodged in court as security. Since we have come to the conclusion that there is no longer justification for allowing a wife to retain this privileged position in matrimonial proceedings, we have thought it desirable to deal more fully, in the paragraphs following, with the wife's present position and to set out the historical background.

Liability of husband for wife's costs

439. The reason for the wife's favoured position arose in the first instance from the fact that at one time marriage operated as an assignment to the husband of all her property. Without funds with which to pay her costs if unsuccessful in proving her case, the wife could not have persuaded a solicitor to take the risk of acting for her in bringing matrimonial proceedings or in defending such proceedings brought against her by her husband. To enable the wife to obtain justice, it was established that, as a general rule, the husband should pay his wife's costs whatever the outcome of the proceedings.

440. In matrimonial proceedings in the Ecclesiastical Courts² the wife's solicitor was able to obtain payment by the husband of her full taxed costs of the suit before the trial took place, since the evidence had to be in writing and complete before the trial. After 1857, when matrimonial jurisdiction was taken over by the civil court, the issues were decided on oral evidence. It then became impossible to arrive before the trial at an accurate figure for the wife's costs, since it could not be forecast how long the trial would last and the total expenses in respect of the witnesses' attendance would not be known. In order to keep as much as possible to the practice of the Ecclesiastical Courts, the court adopted the practice of estimating the wife's costs of the trial, on her application, and would order the husband to lodge in court a sum of money, or to give security, sufficient to cover the estimated costs³. The husband was ordered at the same time to pay the wife her taxed costs to date. If she was unsuccessful at the trial it was at first the rule to give her her costs not exceeding the sum lodged in court or secured⁴. Subsequently the court took the view that it had a complete discretion and could give the wife her full taxed costs even if these exceeded the amount lodged in court, on the basis that where her defence had been fairly and reasonably conducted her solicitor ought to be paid his costs in full⁵. If the wife's suit was "frivolous and vexatious", the court could refuse to award her costs⁶. Usually, however, she was allowed her costs not exceeding the sum lodged in court.

441. If the wife had property or income settled on her for her separate use and sufficient to pay her costs, there was no reason to put her in this privileged position and the Ecclesiastical Courts would not allow her costs to be taxed and paid by her husband before the trial⁷; nor, after 1857, would she be allowed security for her costs. If she was successful, however, she stood in the same position as any other litigant and was entitled to receive her full taxed costs⁸.

² It was also the practice in the House of Lords to order the husband to pay the wife a sum of money to enable her to obtain professional assistance.

³ *Sopwith v. Sopwith* (1860), 2 S. & T. 105; see also *Ellaytt v. Ellaytt, Taylor and Halse* (1864), 3 S. & T. 503, at p. 508.

⁴ *Sopwith v. Sopwith* (1860), 2 S. & T. 105.

⁵ *Robertson v. Robertson* (1881), 6 P.D. 119, at pp. 122, 123.

⁶ See *Jones v. Jones* (1872), L.R. 2 P. & D. 333.

⁷ *Wilson v. Wilson* (1797), 2 Hag. Con. 203.

⁸ *Ellaytt v. Ellaytt, Taylor and Halse* (1864), 3 S. & T. 503, at p. 509.

442. With the removal of a married woman's disabilities in respect of the ownership of property, the old basis for making the husband liable for his wife's costs disappeared. Since, however, a wife may still be partly or wholly dependent financially on her husband, the practice of ordering him, if necessary, to secure her costs of the proceedings has been retained in order that "justice may be done by the wife being enabled to procure the assistance of solicitor and counsel and come to Court"⁹. The court leans towards protecting the wife's solicitor and, if satisfied that he has conducted the proceedings on the wife's behalf in a reasonable and proper manner, will often give an unsuccessful wife her costs, usually limited to the sum in court¹⁰.

443. In 1947, as the result of a recommendation of the Denning Committee, the practice was abolished whereby the court ordered the husband to pay the wife's taxed costs up to the time when the case was set down for trial. Instead, on the wife's application when the case is ready for trial, the court now estimates the sum sufficient to cover the whole of her costs of the suit and, if appropriate, will order the husband to pay that sum or part of it into court as security.

444. When the Legal Aid Scheme came into operation in 1950, a new factor was introduced, since a wife who has little or no means of her own is assured under the scheme of obtaining a solicitor to take or defend matrimonial proceedings on her behalf. Moreover, her solicitor knows that, provided that he has acted reasonably in advising her to continue with the proceedings, he will be re-imbursed as to eighty-five per cent. of his costs (taxed on a solicitor and client basis) out of the legal aid fund, whether or not she is successful. In drawing attention to the fact that Section 1 (7) (b) of the Legal Aid and Advice Act, 1949, expressly retains the rights and liabilities of other parties to the proceedings, the court has said, however, that it is apparent that the intention of the Act was to make the parties liable for the costs of the proceedings in so far as lay within their means; that being so, the legal aid fund should be entitled to the protection previously afforded to the wife and her solicitor by an order against the husband for security for the wife's costs¹¹. Nevertheless, we understand that, in fact, there has been a decrease in the number of applications by wives for security for their costs.

445. It was at first uncertain whether the wife could obtain security for her costs against her husband when he was himself an assisted person. It has now been held¹² that, in the absence of specific regulations on the matter, the provisions of the Act of 1949 and the regulations under it have not affected the right of the Divorce Division to order a husband to provide security for the costs of a wife. An order for security may, therefore, be made in a proper case but, as the court has pointed out, the occasion should arise only rarely. Moreover, an order for costs should not be made against a husband who is an assisted person for a sum in excess of the amount "which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute"¹³.

446. In addition to the husband's liability to pay his wife's costs under an order of the Divorce Division, he may also be sued at common law by her solicitor. This arises from the fact that the costs of the wife incurred by

⁹ *Williams v. Williams*, [1929] P. 114.

¹⁰ See *Usmar v. Usmar*, [1948] W.N. 207, at p. 208.

¹¹ *Wigley v. Wigley*, [1951] P. 156.

¹² *Evans v. Evans*, [1953] P. 41.

¹³ Section 2 (2) (e), Legal Aid and Advice Act, 1949.

bringing or defending matrimonial proceedings are regarded at common law as necessities for which she may pledge her husband's credit¹⁴. The solicitor's right of action arises even if the wife is unsuccessful or if the proceedings have terminated before the trial. The solicitor must have had reasonable grounds for believing that the wife would succeed and must have shown proper diligence in the conduct of the case. His right is lost, however, if it can be shown that the wife had sufficient means of her own or if she had no authority to bind her husband for the supply of necessities by reason of her own conduct, even though such conduct had been concealed from her solicitor¹⁵. If the wife has obtained an order for costs in the Divorce Division, her solicitor may still sue the husband to recover the costs reasonably incurred by him in excess of the amount allowed on a taxation in the Divorce Division on a party and party basis.

Liability of wife for husband's costs

447. Before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, a wife could be condemned in the successful husband's costs only if she had separate means. Even then, however, the court reserved the right to take into account other circumstances in the exercise of its discretion. For instance, it would not condemn a wife in costs if the effect of the order would be to deprive her of her only means of subsistence¹⁶. Moreover, it was not prepared to make an order for costs against the wife if the husband's conduct was to some extent at fault¹⁷. Since the passing of the Act of 1935, a wife can be condemned in her husband's costs without proof that she has any means¹⁸, but it would appear that it is still the usual practice of the court not to grant costs against an unsuccessful wife unless it is shown that she has sufficient means to pay his and her own costs. An exception will be made where the wife has put forward charges against her husband which are quite unfounded, or has denied matrimonial offences of which she is found guilty, having had no reasonable prospects of success¹⁹.

THE PRESENT POSITION: SCOTLAND

448. As in England, a wife is a privileged suitor against her husband in consistorial actions, to the extent that, if she has no separate means, her husband is usually required to pay her expenses, whatever the result of the action, and will not be given his expenses against her if she is unsuccessful.

Liability of husband for wife's expenses

449. "The theory of the law is, that a wife has no means; and therefore, as a general rule, any justifiable litigation carried on by her must be paid for by the husband, as a *necessary*"²⁰. Though the theory on which the rule is based is now out of date, it still applies to the expenses of consistorial actions²¹. A wife has a right to apply to the court, whenever necessary, for interim expenses to be paid by the husband before the proof but she has no

¹⁴ *Stocken v. Patrick* (1873), 29 L.T. 507.

¹⁵ *Durnford v. Baker*, [1924] 2 K.B. 587.

¹⁶ *Carstairs v. Carstairs, Dickenson and others* (1864), 3 S. & T. 538.

¹⁷ *Milne v. Milne and Fowler* (1871), L.R. 2 P. & D. 202, at p. 205. See also *Barker v. Barker*, [1950] 1 All E.R. 812, at p. 815.

¹⁸ This was done in the cases of *Tickle v. Tickle*, [1945] W.N. 132, and *Jestice v. Jestice*, [1945] W.N. 144.

¹⁹ See *Barker v. Barker*, [1950] 1 All E.R. 812, at p. 814.

²⁰ See *Fraser on Husband and Wife*, Second Edition, p. 1230 (Vol. 2, 1878).

²¹ There is no general rule applicable to actions for interim aliment, the matter being within the discretion of the court.

right, as she has in England, to apply for an order for security for her costs. On the other hand, she is in no worse position than a wife in England since if she has no separate means she is usually given her expenses in any event. If the wife has separate means, she stands in the same position as any other litigant and will not generally be given her expenses against her husband unless she is successful at the trial.

450. The rule as to the husband's liability for the necessary expenses of his wife is modified when he is receiving legal aid. In considering the liability of a husband who is an assisted person the court must have regard "to all the circumstances, including the means and the conduct in connection with the dispute of all parties"²².

451. The wife's solicitor may have a right of action at common law against the husband²³ similar to the right he possesses in England (see paragraph 446). In Scotland, however, unless the court orders the wife's expenses to be taxed otherwise, they are taxed on a special matrimonial scale, under which allowance is made only for such expenses as have been necessarily and properly incurred. It may be that in such a case the wife's solicitor has no further claim against the husband for expenses incurred on the wife's behalf.

Liability of wife for husband's expenses

452. If an unsuccessful wife has separate means, she is liable like any other litigant to be ordered to pay her husband's expenses as well as her own²⁴. Otherwise, she will not be ordered to do so.

THE TENOR OF THE EVIDENCE

453. Several English witnesses suggested that, in view of the vast improvement in the financial position of married women since the rule as to liability was first established, husband and wife should now be placed on an equal footing with regard to liability for the costs of matrimonial proceedings. It was pointed out that the provision of legal aid has made a difference to the position of a wife without means. One body proposed that, if a wife is unsuccessful, any sum of money lodged in court by the husband as security for her costs should always be returned to him. We had brought to our notice in particular an actual case in which a successful husband had had to pay his wife's costs although the allegations she had made against him had proved to be quite unfounded.

454. The question of the husband's liability for the wife's costs was considered both by the Gorell Commission²⁵ and by the Denning Committee²⁶. The Gorell Commission accepted the fact that the husband would as a rule have to pay the wife's costs because of the inequality of their respective means but, nevertheless, considered that, before the court ordered provision to be made for her costs, it ought to be satisfied that she had no means and had reasonable grounds of suit or defence. The Denning Committee adopted the words of the Gorell Commission and expressed the view that no wife should have a *prima facie* right to be awarded security for her costs (see also paragraph 443). The Committee pointed out that the rule as to the provision of security often operated unfairly against the husband. It cited the case of a wife who

²² Section 2 (3) (e), Legal Aid (Scotland) Act, 1949.

²³ See *Clark v. Henderson*, 1875, 2 R. 428.

²⁴ See *Richmond v. Richmond* (O.H.), 1934 S.L.T. 130.

²⁵ Cd. 6478, paragraph 407.

²⁶ See Cmd. 7024, paragraphs 79-81, Final Report.

brings a divorce petition which is contested by the husband and who almost automatically gets an order for security from him ; " even if she is unsuccessful in the suit, the Judge in fairness to her solicitor, who has conducted the case on the faith of having the security from the husband, makes an order on the husband to pay the wife's costs up to security, as extended. This is in effect a full order for party and party costs and means that the husband, although he has won the case, has to pay all the costs of it on both sides ".

455. We had no evidence on this subject from the Scottish witnesses. Nevertheless, we consider that the recommendations which we now make should apply to Scotland since the practice is much the same in the two countries.

THE COMMISSION'S RECOMMENDATIONS

456. After very careful consideration we have come to the conclusion that there is really no justification at the present time for allowing a wife to retain her privileged position in matrimonial proceedings against her husband. It is of primary importance that a wife who has good grounds for bringing or defending proceedings should not be denied justice because she has no money with which to obtain professional assistance. That situation does not arise today. In the first place, a married woman has for a very long time been free from any disability with regard to the ownership of property and may well have means sufficient to pay the costs of her solicitor. It is still true, of course, that many married women are financially dependent on their husbands, either wholly or partly. The Legal Aid Scheme, however, now ensures that professional assistance will be available to a wife to enable her to bring or defend matrimonial proceedings. The fact that the husband has ample resources does not disentitle his wife to legal aid since it is provided that, in computing the income and capital of the applicant, the resources of her husband should not be taken into account when the proceedings are matrimonial.

457. We appreciate that if the wife's solicitor has conscientiously conducted the case for her on the basis of the information she has given him, he ought to receive his costs, whether or not his client is successful in the event. At present, the court is concerned to protect him and to ensure that he does not suffer if the wife loses her case. The result is, however, that a husband may be compelled to pay the costs of both sides although he has won the day. This practice is not met with in other types of proceedings and we think that it is unfair to the husband. Where the wife is legally aided, her solicitor's costs are guaranteed. Where she is not legally aided, then, in our opinion, the position of her solicitor should be no different from his position in other types of litigation, where he takes the risk that he may not be able to recover his costs from his client.

458. Accordingly, we recommend that in respect of liability for the costs of matrimonial proceedings husband and wife should now be treated on exactly the same footing.

459. We recognise that in order to give effect to this recommendation, certain changes in the law will be necessary and in particular we recommend :

- (a) That in England and Scotland the wife's costs of bringing or defending matrimonial proceedings should no longer be regarded as necessities for the provision of which her husband is liable.

- (b) That the special practice of the Divorce Division in England whereby a wife may obtain from the court an order that her husband should provide security for her costs of a matrimonial suit, or of an interlocutory application in connection therewith, should be abolished. This will, of course, still leave the court free to order a husband or a wife to provide security for the other's costs under the provisions of the Rules of the Supreme Court, for instance where the respondent to the application for security is resident outside the jurisdiction of the court.
- (c) That the practice of the court in Scotland of awarding interim expenses to a wife against her husband in matrimonial proceedings should be abolished.

460. In our view the court should continue to have a wide discretion in determining the liability for costs in matrimonial proceedings. We contemplate, however, that in the exercise of this discretion a husband will as a general rule not be made liable for the costs of an unsuccessful wife nor will it be necessary for him to prove that she has sufficient means before he can obtain an order for his costs against her.

LIABILITY OF THIRD PARTIES FOR COSTS

A. ENGLAND

461. Not long after the Matrimonial Causes Act, 1857, came into force, rules of practice were established to the effect that before the court would make an order for costs against a co-respondent, the husband petitioner had to prove, not only that the co-respondent knew that the respondent was a married woman, but that he was aware of that fact at the time adultery was first committed. The court has since said that the exercise of its discretion is not fettered by any such rules and that liability must be determined in accordance with the facts of the particular case²⁷.

462. We understand, however, that in practice a husband will not usually obtain his costs unless he can show that the co-respondent knew that the respondent was a married woman or that, if he did not know, the circumstances were such that it would be just to condemn him in costs. It was suggested to us that it is unfair to place this burden of proof on the husband. It is a burden which in many cases can only be met with the greatest difficulty and it might well be thought that the burden should be upon the co-respondent, once the adultery has been proved, to show cause why he should not be condemned in costs²⁸. We accept this criticism and we recommend that, while the court should retain an absolute discretion in the matter of costs, it should be presumed that the co-respondent committed adultery with the respondent in the knowledge that she was a married woman until the contrary has been proved. The same presumption should arise when a claim for costs is made by a wife against the woman named in her pleading.

²⁷ *Langrick v. Langrick and Funnell*, [1920] P. 90; see also *Burne v. Burne and Helvoet*, [1920] P. 17, and *Smith v. Smith and Reed*, [1922] P. 1.

²⁸ See the remarks of McCaig J. in *Butterworth v. Butterworth and Englefield, etc.*, [1920] P. 126, at p. 155.

B. SCOTLAND

463. Section 7 of the Conjugal Rights (Scotland) Amendment Act, 1861, gives the court power in an action by a husband for divorce on the ground of adultery to order the co-defender to pay the pursuer's expenses. There is no such provision in respect of an action for divorce by a wife. We can see no reason for making any exception and we recommend, therefore, that in an action for divorce on the ground of adultery at the instance of a wife, the court should be able to order the woman with whom the husband is found to have committed adultery to pay part or the whole of the wife's expenses.

464. In Scotland, as in England, the pursuer has to prove that the co-defender knew that the defender was a married woman at the time the adultery was committed. We consider that the change which we have proposed in paragraph 462 in respect of England should also apply to Scotland, and we recommend accordingly.

PART VII

MAINTENANCE: ALIMENT

MAINTENANCE FOR A SPOUSE: ENGLAND

PRINCIPLES OF LIABILITY

THE PRESENT POSITION

465. It is a general principle, based on the common law, that a husband is required to support his wife during the marriage. This liability is not absolute, being dependent to some extent on the wife's conduct and her ability to support herself. Following this principle, various statutes have given her a right to apply to the court for an order for her maintenance. If the marriage is dissolved or annulled by decree, the court has a wide discretion to order the husband to provide for his former wife. The husband, on the other hand, has a right to apply for provision to be made for him by his wife if the court has granted him a decree of divorce, judicial separation or restitution of conjugal rights, but this right is limited by the restricted nature of the provision which the court can order the wife to make. A further rule is that a husband or wife may be required to maintain the other spouse if she or he becomes destitute and would otherwise need national assistance. We now describe the law in more detail.

Liability under the common law

466. While husband and wife are living together, the husband must provide in a manner in keeping with his means for the reasonable needs of his wife and his household. For this purpose he may make his wife an allowance or she may have his express or implied authority to contract as his agent for the reasonable supply of goods and services for her own use and for the use of the household to an extent suitable and sufficient for the way in which they are living. A presumption that the wife has been given this authority is raised by the fact that husband and wife are living together. The wife has no corresponding liability in respect of her husband under the common law.

467. Generally speaking, a husband is still liable under the common law to support his wife when they are living apart. The obligation is, however, suspended if she deserts him. It is ended if she commits adultery. It is also ended if either husband or wife obtains a decree of divorce or nullity of marriage. The wife's authority to contract as her husband's agent will as a rule cease once they have separated. However, if the husband has deserted the wife or has turned her out of the home without adequate cause or has forced her to leave the home by his ill-treatment of her, or if he unjustly withholds from her a sufficient allowance (whether or not under the terms of an agreement), or fails to make payments under an order of the court after a decree of judicial separation or a separation order¹, so that she is left without the means of supplying herself with necessities suitable to her station in life (and has insufficient means of her own²), she has

¹ A husband who is paying regularly under a maintenance order (as distinct from a separation order) made by a magistrates' court may still be liable for his wife's necessities; *Sandilands v. Carus*, [1945] K.B. 270.

² *Biberfeld v. Berens*, [1952] 2 All E.R. 237.

an irrevocable authority, as an agent of necessity, to pledge her husband's credit in order to provide herself with such necessities³. In practice, this right is not of much value to a wife if she cannot persuade tradesmen and others to give her credit.

468. If, having the means, the husband fails to perform this duty to maintain his wife, she may apply to the court for a maintenance order or, if she is destitute, she may apply for national assistance.

Liability under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949

469. The common law liability of a husband to maintain his wife has been supplemented by statutory provisions which enable a wife to obtain a maintenance order from a magistrates' court on various grounds, the most important of which are his adultery, persistent cruelty, desertion or wilful neglect to provide reasonable maintenance for her or the children. So long as husband and wife remain apart, the husband's liability under the order lasts indefinitely but it is always open to him to apply to the court for its discharge (for instance, on the ground that she has committed adultery) or for a variation in the amount. A magistrates' court also has power to order a husband to support his wife where he has obtained a separation order against her. A magistrates' court has no power under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, to order a wife to pay maintenance to her husband.

Liability under the National Assistance Act, 1948

470. If the wife is destitute she may apply for national assistance. For a long time a husband has been under a statutory duty to make such payments to his wife as lie within his means to prevent her from becoming a charge on the parish. The change from poor law relief to national assistance has not affected this liability, which is now imposed by Section 42 of the National Assistance Act, 1948. The duty of the National Assistance Board under this Act is to grant the wife such assistance as may be necessary and to endeavour by persuasion or legal process to get the husband, if he is legally liable⁴, to pay what he can. It is understood that the Board as a rule prefers to assist the wife herself to obtain a maintenance order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949. However, the Board is empowered by Section 43 of the Act of 1948 itself to take proceedings to obtain payments from the husband (even against the wish of the wife), and if he persistently neglects to support his wife, it has power under Section 51 of the Act to prosecute him.

471. In so far as lies within the wife's means, she is liable to provide for the support of her husband if he is destitute and compelled to apply for national assistance. Section 42 of the Act of 1948 makes no distinction between husband and wife and the National Assistance Board may bring civil or criminal proceedings against her under Section 43 or 51 of the Act if she wilfully fails in this duty.

³ A wife will also have authority as an agent of necessity to pledge her husband's credit in respect of necessities if they are living together and he gives her nothing save the shelter of his house; *Debenham v. Mellon* (1880), 5 Q.B.D. 394, at p. 398.

⁴ The adultery of the wife ends, and her desertion suspends, the husband's liability (*National Assistance Board v. Wilkinson*, [1952] 2 Q.B. 648). Moreover, he is no longer liable once the marriage has been terminated by decree of the court.

Liability under the Matrimonial Causes Act, 1950

(1) DURING THE MARRIAGE

Liability of the husband

472. In proceedings in the High Court for divorce, nullity of marriage, judicial separation or restitution of conjugal rights, the husband may be ordered to support the wife until final decree. After a decree of judicial separation has been obtained, whether by the wife or the husband, or after the wife has obtained a decree for restitution of conjugal rights, the court may order the husband to make such provision for the wife as it thinks just.

473. A wife may also apply to the High Court under Section 23 of the Matrimonial Causes Act, 1950, for an order for maintenance on the ground of her husband's wilful neglect to provide reasonable maintenance for her or for the children.

Liability of the wife

474. Although no liability for her husband's support is imposed on a wife by the common law, in certain circumstances a husband may obtain an order against his wife in matrimonial proceedings in the High Court. The court was given power by the Matrimonial Causes Act, 1857, to order a wife against whom a decree of judicial separation had been pronounced on the ground of her adultery, to settle her property in favour of the husband (and the children of the marriage, if any). The Matrimonial Causes Act, 1884, extended that power to the case where a decree for restitution of conjugal rights had been made against a wife; at the same time the court was given power in such a case to order her to make periodical payments to her husband if she was in receipt of any profits of trade or earnings. This latter provision has not been extended to proceedings for judicial separation, although the power of the court to order a settlement of the wife's property was extended by the Matrimonial Causes Act, 1937, to cases where a decree of judicial separation was pronounced against a wife on the ground of her cruelty or desertion. In exercising its powers, the court proceeds on the basis that, if the wife has considerable means of her own, the husband should continue to enjoy the benefit from those means which it is reasonable to suppose he would have enjoyed if she had not left him⁵.

475. In the special case of proceedings for divorce or judicial separation taken by a wife on the ground of her husband's insanity, she may be ordered to provide for his support until final decree. Moreover, if she were granted a decree of judicial separation on that ground, she could be ordered to provide for his support after decree.

(2) AFTER THE MARRIAGE HAS BEEN TERMINATED

Liability of the husband

476. The husband's liability to maintain his wife ceases when the marriage is terminated by a decree of divorce or nullity⁶. The wife, however, has had conferred on her by statute a right to apply to the High Court and the court, if it thinks fit having regard to the conduct and means of both parties, may order the husband to make suitable provision for her future maintenance. It has been said that the object of Parliament in giving the wife this right of application was to provide a substitute for the support to which she would have been entitled had the marriage continued and, in the public interest, to prevent her from being thrown upon the community for

⁵ *March v. March and Palumbo* (1867), L.R. 1 P. & M. 440; *Matheson v. Matheson*, [1935] P. 171.

⁶ Except that he still remains liable to make payments under a maintenance order made by a magistrates' court.

support⁷. Generally speaking, the court will have regard to the standard of living set by the husband and wife while they were living together. If the wife's means are not enough to enable her to keep to that standard, then the husband will be required, so far as he is able, to make provision for her sufficient for that purpose. If the husband's means are later substantially increased, the court is prepared to increase the amount of the maintenance payable on the basis that the wife would have shared in his good fortune if they had continued to live together.

477. At one time it was usual for the court to order that the payments should cease if the wife married again, or if she were unchaste, since it was thought unreasonable that a husband should then have to maintain her⁸. Subsequently, however, the court resisted attempts to persuade it to lay down hard and fast rules, and it is now established that, subject to the lapse of time (see paragraph 480), the court has a complete discretion to order a husband to make provision for his former wife after the marriage has been dissolved or annulled, although its powers as to the nature of the provision which it can order are to some extent restricted (see paragraph 512). Thus, the fact that the wife has married again does not prevent her from applying for, and being awarded, maintenance against her first husband⁹.

478. The court's wide discretion is instanced by its power to order a husband to make some provision even for a guilty wife. Before 1857, when a divorce could only be obtained by Act of Parliament, it was the usual practice to require a husband who was seeking a divorce from his wife to make some provision for her future as a condition of passing the Private Bill of Divorce. One reason given for this practice is that, since only a wealthy man could afford to obtain a divorce in this way, it would be no great hardship for him to provide for his former wife if she had no means of her own¹⁰. It has also been suggested that the practice originated because the passage of the Bill would then be less likely to be opposed by the wife's relatives and friends in the legislature, and that it continued because it was thought to be not unreasonable that her husband should make some provision for her, if he had benefited from her fortune or "her defection was accompanied by palliating circumstances"¹¹.

479. Section 32 of the Matrimonial Causes Act, 1857, which gave the court power to order a husband to provide for his wife after a decree of divorce, made no distinction between the wife who had obtained a divorce and the wife who had herself been divorced. It was at one time thought that, nevertheless, before a guilty wife could obtain an order for maintenance, she would have to show either special circumstances, such as the misconduct of her husband, or that the husband consented to the order. But the Court of Appeal expressly held in the case of *Ashcroft*¹² that the terms of Section 32 of the Act of 1857 gave the court an absolute discretion. In that case, the marriage having lasted twenty-three years, the wife having no means and no relations to whom she could look for support, and being in delicate health and unable to support herself, the husband was ordered to make a small provision for her. In this respect, the terms of Section 19 of the Matrimonial Causes Act, 1950, governing the right of a wife to apply for maintenance on

⁷ *Watkins v. Watkins*, [1896] P. 222, at p. 230; *Hyman v. Hyman*, [1929] A.C. 601, at p. 629.

⁸ *Fisher v. Fisher* (1861), 2 S. & T. 410, at p. 414.

⁹ *Snelling v. Snelling*, [1952] 2 All E.R. 196, in which case the second husband had died within two months of the final decree dissolving the wife's first marriage, and the court made a nominal order in her favour.

¹⁰ *Robertson v. Robertson* (1883), 8 P.D. 94.

¹¹ See *MacQueen on The Law of Marriage, Divorce and Legitimacy* (2nd Edition, 1860) at pp. 145-146.

¹² *Ashcroft v. Ashcroft and Roberts*, [1902] P. 270.

a decree of divorce or nullity of marriage, are in substance the same as those of Section 32 of the Act of 1857.

480. There is, however, one limitation which prevents the court's discretion from being absolute. Its power to make an order is restricted in point of time. This arises from the fact that Section 19 of the Matrimonial Causes Act, 1950, using the words of previous Matrimonial Causes Acts, gives the court power, if it thinks fit, to make an order for maintenance "on any decree for divorce or nullity of marriage". Judicial interpretation of the word "on" has established that the order does not have to be made immediately on the pronouncement of the final decree but may be made within a reasonable time after it, having regard to the particular circumstances of the case¹³.

481. The practice of the court is now to require a wife to obtain leave of the court to file her application for maintenance if more than two months have elapsed from the date when the decree *nisi* was made absolute. At the hearing of her application for leave, one matter for consideration is whether, if the court were to decide that the husband ought to make some provision for her, the resulting order could be made in accordance with the terms of the statute as interpreted, namely, within a reasonable time after the final decree. In very unusual circumstances the court has allowed an application for maintenance to be filed seven-and-a-half years after the decree and, in another case, ten years afterwards, but the fact that leave to apply is given does not preclude the court from taking the delay into account when subsequently considering the wife's application¹⁴. It is, however, open to a wife who does not require maintenance after the divorce (for instance, because she has means of her own), to provide for the contingency that her circumstances might change, since the court is prepared to make a nominal order in her favour if she applies within the time-limit. She may then apply for the order to be varied at any time in the future.

Liability of the wife

482. If a divorce is granted to a husband on the ground of his wife's adultery, cruelty or desertion and she has property, she may be required by the court to settle it, or part of it, for the benefit of the husband (and the children of the marriage, if any). Moreover, in the special case where a divorce has been granted to a wife on the ground of her husband's insanity, the court has power to order the wife to provide for his support.

The wife's earning capacity

483. In considering a wife's application for maintenance, the court must have regard to the means of both husband and wife, including, if the wife is employed at the time of the application, what she is earning¹⁵. If the wife is not working, it is, however, uncertain how far the court has to take into account the amount she would be likely to receive if she were earning. The Court of Appeal, considering the position of a wife who had divorced her husband (and we believe that similar considerations are taken into account where husband and wife are separated but not divorced), refrained from laying down any general rule¹⁶. In that case, Denning L.J. said:

"Of course, if a wife does earn, then her earnings must be taken into account: or if she is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, then her potential earning capacity ought to be taken into account; or if she had worked regularly during the married life, and might reasonably

¹³ *Scott v. Scott*, [1921] P. 107.

¹⁴ *Fisher v. Fisher*, [1942] P. 101.

¹⁵ *Higgs v. Higgs*, [1941] P. 27.

¹⁶ *Rose v. Rose*, [1951] P. 29.

be expected to work after the divorce, her potential earnings ought to be taken into account. Except in cases such as these it does not as a rule lie in the mouth of a wrongdoing husband to say that she ought to go out to work simply in order to relieve him from paying maintenance."

In a recent case¹⁷ brought under Section 23 of the Matrimonial Causes Act, 1950, the court refused to accept that a wife who had been deserted by her husband and who had worked before the marriage was under an obligation "to go back to earning in order to reduce the husband's liability to maintain her", even though she was still a young woman and had no children dependent on her.

TENOR OF THE EVIDENCE

484. The evidence has raised important points with regard to (a) the extent to which a husband should be required to support his wife, and (b) the extent to which a wife should be required to support her husband.

485. A number of witnesses suggested that the effect of the present law is to encourage a wife to live in idleness for the rest of her life on the maintenance paid by her husband, or her former husband. They said that, firstly, this is in itself undesirable; if she is able to work for her living she should do so, in her own interest as well as in the interest of the community; secondly, it is unfair to the husband; if there has been a divorce, he may be prevented from making a second marriage; if he does marry again, his second wife (who may often have had nothing to do with the breakdown of his first marriage) and his second family may be kept short of money, to the point of real hardship; further, even if the husband does not have to pay maintenance after divorce, because his wife marries again or has means of her own, he has still hanging over him the possibility that he may be called upon to support her in the future if she falls on hard times.

486. Some witnesses considered a complete change of principle to be necessary—each spouse should primarily be liable to support himself or herself. It was contemplated, however, that the wife should still be able to apply for maintenance from her husband (or former husband) but the burden would be upon her to satisfy the court that she could not support herself, for instance because age or ill-health prevented her from working, or because she had young children to look after; it might also be reasonable to allow her maintenance while she was training to take up work.

487. Other witnesses contemplated that in principle the husband should remain liable for the support of his wife but they thought that the court should be required to take into consideration to a far greater extent than it does at present the fact that the wife, though not working at the time of the application, may well be capable of earning her own living.

488. Other suggestions were:

- (i) The duration of maintenance orders should be limited to, say, two years. (It would be open to the wife to make a fresh application when the order lapsed.) Alternatively, the court should have a discretionary power to limit the duration of an order.
- (ii) If the wife marries again, the husband's liability should be at an end.

¹⁷ *Le Roy-Lewis v. Le Roy-Lewis*, [1954] 3 W.L.R. 549. See also *J. v. J.*, [1955] 2 W.L.R. 973.

489. A few witnesses considered that no wife who has committed a matrimonial offence should have a right to apply for maintenance.

490. As we have said, the second matter dealt with in the evidence is the liability of the wife to maintain the husband. A number of witnesses proposed that the husband should be able to apply to the court for an order that his wife should make provision for his support, on the footing that there should be equality between the sexes in this as in other respects. Section 42 of the National Assistance Act, 1948, recognises this principle to a limited extent, but the witnesses considered that the wife's liability should be put on a broader basis.

THE COMMISSION'S VIEWS AND RECOMMENDATIONS

Liability of the husband

491. Although within the last one hundred years there has been a considerable change in the economic position of a married woman, it nevertheless remains a fact that most married women still look to their husbands as the principal if not the sole provider for the family. This could not be otherwise since the wife's contribution is primarily in running the home and looking after the children. We can see no reason, therefore, for suggesting any material change in the principles which regulate either the liability of a husband to maintain his wife during the marriage or the discretion of the court to order him to provide for her after the marriage has been dissolved or annulled. Each case will vary and we think that it must be left to the court to determine what is reasonable in the particular circumstances.

492. We do not accept the suggestion that a specific limit should be set to the duration of all maintenance orders. The wife would then be in a position of uncertainty and would be put to the trouble of making a fresh application to the court if (as we think would happen in the majority of cases) she still required maintenance after the order had expired. The court would also be given a great deal of unnecessary work. It is open to the husband to apply to the court at any time for the order to be varied or (if the circumstances warrant this) for it to be discharged. On occasion, however, it might be preferable that the order should be expressed to last for a definite period. It seems uncertain if the court can do this at present but we think that it should have this power, and we recommend accordingly. The setting of a limit to the duration of an order should not, however, preclude the court from varying the order at any time during the period for which it was set to run or from making a fresh order at any time after the lapsing of an order.

493. We think that the dissatisfaction with the present system which the evidence reveals stems for the most part from a feeling that the court does not take into consideration sufficiently, or at all, the fact that a wife may well be able to obtain employment but chooses not to do so while she can receive money from her husband (or former husband). We are agreed that in principle it is undesirable nowadays that a woman should receive maintenance if she is well able to support herself, and would in fact have had to do so if she had been left a widow. At present the court takes into account the wife's capital, if any, and what she is earning at the time of the application. We consider that, if it does not already do so (see paragraph 483), the court should also have regard in every case to what may be termed the wife's potential earning capacity, if she is not working at the time of the application.

494. We do not think it possible, or indeed appropriate, to lay down rules for the determination of a wife's potential earning capacity. The matter must be left to the court's discretion in the circumstances of the particular case. It is reasonable that a wife who has been left with young children or a wife who is incapacitated by age or illness should look to her husband for maintenance. On the other hand, the illustrations mentioned by Denning L.J. in his judgment in the case of *Rose* (see paragraph 483), namely, the young wife with no children or the wife who had worked regularly during the married life together, are examples of cases where it would be reasonable to expect the wife to make some attempt to support herself. A third example is that of the wife who has worked regularly before her marriage and who is separated from her husband not long afterwards.

495. We think, too, that the standard of living enjoyed by the wife before the marriage broke down should also be taken into consideration. Where the husband's income is sufficient, a wife who has been separated from her husband through no fault of her own should not be expected to suffer any material change in her way of life; and, indeed, this is a consideration to which the court at present has regard (see paragraph 476). It follows that a wife should not be expected to seek work which is quite unsuited to her age or to the position which she has occupied in the community, unless, of course, there is no alternative; it may also be reasonable that a wife should be allowed time to fit herself for suitable employment. Often, however, to keep up two separate establishments may be more than the husband's income can support and then both husband and wife will have to bear a reduction in their standard of living.

496. We consider that the court should have the widest possible discretion to order a husband to provide for his former wife after a decree of divorce or nullity of marriage, subject to one exception with which we now deal¹⁸. At present, if the wife marries again the court will often take that as a reason for discharging a maintenance order against her first husband, but there still remains the possibility that she may apply at some later date for a fresh order. We consider that a wife should have to accept that, if she marries a second time, she should cease to have any claim against her first husband. We recommend, therefore, that if, after a marriage has been dissolved or annulled, the wife marries again, then, subject to any agreement between the parties to the contrary, any order for her maintenance made by the High Court (including an order for a secured provision) or by a magistrates' court should automatically cease to have effect: where an order has not been made, the wife's re-marriage should extinguish her right to claim maintenance from her former husband in the future.

497. Our attention has been drawn to a gap in the court's powers in as much as the effect of Section 19 (4) of the Matrimonial Causes Act, 1950, is to take away the right of a wife to apply for provision to be made for her in proceedings which she is bringing against her husband on the ground of his incurable insanity, and to give such a right to the husband instead. We appreciate that it may have been thought in 1937 that the wife in those circumstances ought to accept that if she chose to bring the marriage to an end, she would not be entitled to maintenance and that the husband who has been divorced on a ground arising through no fault of his own ought not to be required to maintain her. There may well be deserving cases, however, where it would be reasonable that some provision should be

¹⁸ The six members who consider that a guilty spouse should not be able to obtain an order for maintenance would limit the exercise of this discretion to cases where the court is considering an application by the innocent spouse (see paragraph 503).

made for the wife and we think that it can be left to the court to ensure that the interests of the husband are safeguarded. We recommend, therefore, that a wife who has filed a petition for divorce¹⁹ against her husband on the ground of his incurable insanity should be able to apply to the court for an order that provision be made for her out of her husband's estate. In conformity with the view we express in paragraph 499, we consider that a husband petitioner should be given the same right of application.

Liability of the wife

498. As we have shown (see paragraphs 471, 474 and 482), it is not a new idea that a wife should be ordered to make some provision for her husband. We think it, however, a valid criticism of the present law to say that the right of a husband to apply to the court for provision to be made for him by his wife is much too restricted.

499. In the first place, we think that in matrimonial proceedings in the High Court husband and wife should be put on the same footing in respect of the right to apply for financial provision (see also paragraphs 515-518). We think that it can be left to the court to decide the circumstances in which it would be reasonable to require a wife to make some provision for her husband, although he is not in any danger of becoming destitute. A husband who has become used to a considerably higher standard of living since his marriage to a wealthy wife may well suffer financial hardship on her leaving him, especially if he has given up or prejudiced his career at his wife's request (see paragraph 474).

500. Secondly, we see no reason why a husband who is unable to support himself should have to apply for national assistance if his wife has sufficient means to support him and unjustifiably refuses to do so. We have in mind, in particular, the husband who is an invalid or who is too old to work. Accordingly we recommend that a husband should be able to apply to the High Court or to a magistrates' court for a maintenance order against his wife on the ground that he is destitute and unable to support himself and that his wife, having means more than reasonably sufficient for her own support, has failed to support him. It should, of course, be open to the wife to show just cause why she ought not to be required to support her husband, for instance because he had committed adultery.

Liability to support a guilty spouse

501. We are divided in opinion whether a husband or a wife should be required to support a guilty spouse.

Views of thirteen members

502. Thirteen of us²⁰ are satisfied that the court can safely be relied upon to order provision to be made for a guilty spouse only if it would be reasonable to do so in the circumstances. The power to make such provision has a long history; the legislature exercised it in respect of a wife divorced by her husband by Act of Parliament (see paragraph 478) and the Ecclesiastical Courts had a discretion in respect of a wife from whom her husband obtained a divorce *a mensa et thoro* (judicial separation); the High Court has had this power in proceedings for judicial separation and divorce since 1858, and the magistrates' courts in proceedings by a husband for a separation

¹⁹ A similar position arises in proceedings by the wife for judicial separation on the ground of her husband's incurable insanity, but we are recommending that this should no longer be a ground of judicial separation (see paragraph 316).

²⁰ Mrs. Allen, Dr. Baird, Mr. Beloe, Mrs. Brace, Lady Bragg, Sir Russell Brain, Mr. Brown, Mr. Flecker, Mr. Lawrence, Mr. Mace, Mr. Maddocks, Mr. Justice Pearce, Lady Portal.

Views of thirteen members—*continued*

order since 1903. The power has been used sparingly and in cases where the wife would have suffered great hardship if the order had not been made. We consider, therefore, that a wife who has had a decree or order made against her based on the commission of a matrimonial offence should keep the right which she has under the present law to apply for provision to be made for her. Further, we think that the right of application should be extended to a husband in those circumstances²¹, since, as a general rule, we consider that husband and wife should now be put on the same footing (see paragraph 499).

Views of six members

503. Six of us²² think it wrong in principle that a husband or wife should be called upon to maintain a guilty spouse. It is a rule of the common law of England that a husband's liability to maintain his wife during the marriage ends if she commits adultery and is suspended if she has deserted him. The statutory deviations from this rule may be explained on the assumption that the legislature wished to ensure that a wife should not be left completely destitute. We doubt whether that could happen nowadays because, even if a woman cannot find employment, she may ask for national assistance. A husband may well preserve some kindly feelings towards the wife he has divorced and, if she has been left destitute, it is open to him voluntarily to make her an allowance. That is quite different from compelling him to provide for her. We consider, therefore, that a spouse who has had a decree or order made against him or her based on the commission of a matrimonial offence should not have any right to apply to the court for maintenance. We wish to make it clear that in associating ourselves with the recommendations which are made by the Commission in this part of the Report, we do not intend that they should be applied in favour of a guilty spouse. We do not, of course, contemplate any change in the power of the court to order provision to be made for a husband or wife from whom a divorce has been obtained on the ground of incurable insanity.

The time for making an order

504. We have referred (in paragraph 480) to the restriction on the court's power to order a husband to provide for his wife after the marriage has been ended, since the statute requires the order to be made "on" the decree. It has been suggested that, although the court has liberally interpreted the wording of the statute, it may still cause some difficulty and that a less rigid limitation should be imposed or the court should be empowered to extend the time in a proper case.

505. It is clear that the wording of the statute has given trouble in its interpretation. The court has worked out the principle, with which we are in agreement, that the order should be made within a reasonable time after the decree²³. In our view, the limitation on the power of the court is now unnecessary and, in fact, inconsistent with the complete discretion which the court has in other respects. We note that a similar form of wording has been used, for the first time, in the Matrimonial Causes Act, 1950, in

²¹ We see no need, however, to implement this recommendation in respect of proceedings in the magistrates' courts.

²² Lord Morton of Henryton, Sir Frederick Burrows, Mrs. Jones-Roberts, Lord Keith of Avonholm, Lord Walker, Mr. Young.

²³ *Scott v. Scott*, [1921] P. 107.

continuing the power given to the court by previous statutes to order a husband to provide permanent alimony for his wife after a decree of judicial separation²⁴; this, too, we think should be altered. We recommend, therefore, that the power of the court to order a husband or wife to provide for the other spouse should be exercisable at the time of the making of a decree of judicial separation, divorce or nullity of marriage or at any time afterwards. In the case of a decree of divorce or nullity of marriage, the present practice is that an order made before the decree *nisi* is made absolute does not take effect until the decree becomes final, and we think this practice should continue.

The time for making an application

506. We have also given consideration to the time at which an application for maintenance should be made. Under the present Rules a wife may include a claim in her petition or she may file a separate application after the petition has been filed (but only by leave of the court if more than two months have elapsed from the date when the decree *nisi* was made absolute).

507. The procedure was criticised by witnesses²⁵. It was said that there may be many reasons why a husband may decide not to contest divorce proceedings brought by his wife but would consider it unfair that he should be made wholly responsible for her maintenance. Although the court must have regard to the conduct of the parties in awarding maintenance, a husband will not be allowed to bring forward the adultery or other conduct of his wife if he did not do so in defence of the suit itself²⁶. If therefore a claim for maintenance is made after the trial, the husband may find that he cannot place evidence before the court of the conduct of his wife which might materially affect the amount of the order made against him. It was suggested that the documents served on the husband with the petition for divorce should point out that if he did not raise any conduct of his wife as a defence to the suit or by way of a cross-charge, he might be stopped from doing so in any proceedings for maintenance subsequently brought by her.

508. This is a difficult problem. On the one hand, it is clearly undesirable that misconduct which could have been put forward by way of defence or recrimination in the suit itself should be raised for the first time in subsequent maintenance proceedings. A possible exception is where the applicant is living with the man with whom she had committed adultery; the fact that she is being supported by him ought to be regarded as relevant. On the other hand, the husband ought to be informed at an early stage of all the possible consequences of the divorce proceedings; he will then be aware of

²⁴ In *Cooper v. Cooper*, [1952] 2 All E.R. 857, it was suggested that Parliament had not intended that the power of the court should be so limited. Rule 45 of the Matrimonial Causes Rules, 1950, in fact, says that an application may be made at any time after a decree of judicial separation has been pronounced, but this may now be *u'tra vires*.

²⁵ One criticism has now been met. Until recently there was a belief in some quarters that a wife could file her application within the time-limit and then, having as was thought preserved her rights, allow her claim to lie dormant until such time as a need for maintenance arose. This practice was strongly condemned in the case of *Simmonds v. Simmonds*, [1955] 3 W.L.R. 129, and it was emphasised that the proper course for a wife to take, if she wishes to preserve her rights, is to proceed with her claim and ask the court to grant her a nominal order (see *Stephen v. Stephen*, [1931] P. 197).

²⁶ In *Duchesne v. Duchesne*, [1951] P. 101, a distinction was drawn between

(i) cases where, although the earlier conduct of the wife had contributed to the final break-up of the marriage, it provided no effective answer to the petition and did not amount to conduct conducing, and

(ii) cases where the conduct of the wife would have provided an effective answer to the petition or might otherwise have affected the court's decision.

In (ii) the husband will not be allowed to bring forward such conduct on the application for maintenance.

his responsibility to his former wife before he has incurred other obligations. We think that the difficulty can best be met by requiring that an application for maintenance should be made at the earliest possible moment and proceeded with expeditiously.

509. Accordingly, we recommend that in proceedings for divorce, nullity of marriage or judicial separation a claim by the petitioner that the respondent spouse should be ordered to make provision for him or her should as a general rule be made in the petition. There may, however, be circumstances in which it would be unjust to bar a spouse from applying after the trial for financial provision. We recommend, therefore, that, if no claim has been made in the petition, it should be possible for the petitioner to apply to the court for leave to make an application after the trial. The application should be made to a judge and, unless otherwise directed, on notice to the other spouse.

510. In order that the respondent spouse should be fully acquainted with the position, we propose that, whenever a claim for financial provision is made in a petition, the documents served upon him or her should point out that if he or she wishes to plead any matters in answer to the application which would also be an answer to the petition, or which would in any way affect the question whether a decree should be granted to the petitioner, he or she must plead such matters before the trial.

511. There is no provision in the present Rules which allows a respondent spouse to include a claim for maintenance in the answer to the petition. In the light of what we have said above, we consider that where a respondent spouse is cross-petitioning for divorce, nullity of marriage or judicial separation in the answer to the petition and wishes to apply for provision to be made for him or her, the claim should be subject to the same rules which we are recommending should apply to a claim by a petitioner.

THE NATURE OF THE PROVISION WHICH CAN BE MADE BY THE HIGH COURT

Orders which can be made in matrimonial proceedings

512. The court has power to make three types of order, namely:

- (i) an order for the payment of weekly, monthly or other periodical sums ;
- (ii) an order for the securing of a gross or annual sum of money ;
- (iii) an order for the settlement of a spouse's property.

Whether it can make a particular type of order depends on the nature of the matrimonial relief which has been sought, as will be seen from the following table :

	Periodical payments	Secured provision	Settlement of property
(1) The court may make an order in favour of a wife after a decree (or order) of			
(a) divorce	Yes	Yes (for wife's life)	No
(b) nullity of marriage... ..	Yes	Yes (for wife's life)	No
(c) judicial separation	Yes	No	No
(d) restitution of conjugal rights ...	Yes	Yes (for joint lives)	No
(e) husband's wilful neglect to provide reasonable maintenance for wife or children.	Yes	Yes (for joint lives)	No

	Periodical payments	Secured provision	Settlement of property
(2) The court may make an order in favour of a husband who has obtained a decree of			
(a) divorce	No	No	Yes
(b) nullity of marriage... ..	No	No	No
(c) judicial separation	No	No	Yes
(d) restitution of conjugal rights ...	Yes	No	Yes

In addition, on the application of either party, the court may, after a decree of divorce or nullity of marriage, make an order varying the terms of any ante-nuptial or post-nuptial settlement.

513. If, after a decree of divorce, or nullity of marriage, it is agreed that the husband should pay a specified lump sum in satisfaction of his wife's claim for maintenance, the court may be asked to recite the terms of the agreement in an order dismissing the wife's application. The court has no power, however, to order the payment of a lump sum, nor can it direct that such payment should extinguish the wife's right to claim maintenance at a later date.

514. Several witnesses commented on the deficiencies and anomalies in the court's powers. In particular, it was suggested that the court should be given power to order a lump sum payment: a wife might prefer to have a capital sum, which would enable her to retain a sense of financial security and allow her to set up a new home, while her husband might be glad to be relieved once and for all of the responsibility of providing for her future maintenance. It was also represented to us that it is undesirable that a wife should be financially worse off if she obtains a judicial separation than if she obtains a divorce.

515. We think that there should be some extension of the power of the court to order one spouse to make provision for the other. In the first place, we think that whatever types of order the court is able to make on the application of a wife, it should also be able to make on the application of a husband. Secondly, we think that the court should be given power to order a lump sum payment to be made by way of financial provision. Thirdly, we think that the court should have power to deal with the matrimonial home and its contents. This last matter, however, raises issues which are not within the scope of this section of our Report and is dealt with in Part IX. We now set out our proposals in detail.

516. Where the marriage is ended by divorce or annulment we think that the court should have the widest possible discretion as to the kind of financial provision it can order one spouse to make for the other. We therefore recommend that if a decree of divorce or nullity of marriage has been granted, the court should have power to make orders, on the application of the husband or the wife, for periodical payments, a secured provision (for the life of the spouse in whose favour the order has been made), a lump sum payment and settlement of property. It should also have the power that it has at present to make an order varying the terms of an ante-nuptial or post-nuptial settlement. In exercising the power to order a lump sum payment by one spouse to the other, the court should not be precluded, if it thinks fit, from ordering additional provision to be made in some other way, for example by periodical payments. On the other hand, we think that the court should be able to direct that the payment of a lump sum should extinguish the right to claim maintenance where it appears to the court that a composition of this nature would be fair to both parties, and we recommend accordingly.

517. If a decree for restitution of conjugal rights has been granted or an order for maintenance has been made on the ground of wilful neglect to maintain, we recommend that the court should have power to make orders for periodical payments and a secured provision (for joint lives), in favour of either the husband²⁷ or the wife. It would seem that the court has at present no power to order that part of the periodical payments should be secured and part unsecured. We think that the court should have the same power as it has on divorce, namely, the power to make an order for periodical payments in addition to, or instead of, an order for a secured provision.

518. If a decree of judicial separation has been granted, we recommend that the court should have power to make orders for periodical payments only, in favour of the husband or the wife²⁸.

519. It will be seen that we propose to take away from the court its present power to order a settlement of a wife's property where the husband has obtained a decree of judicial separation or restitution of conjugal rights. Although the court has had this power for a considerable time, we understand that it is very rarely used nowadays, if at all. Such a power may be necessary in the case of divorce to make a lasting settlement between the parties. The situation seems to us quite different where the status of the parties remains unchanged by the court's decree.

520. In order to show the effect of our recommendations²⁹ we have set them out in a table, which may be compared with the table on pages 140-141 summarising the present position.

	Effect of Commission's recommendations			
	Periodical payments	Secured provision	Settlement of property	Lump sum
The court may make an order in favour of a wife or a husband after a decree (or order) of				
(a) divorce	Yes	Yes (for wife's or husband's life)	Yes	Yes
(b) nullity of marriage ...	Yes	Yes (for wife's or husband's life)	Yes	Yes
(c) judicial separation... ..	Yes	No	No	No
(d) restitution of conjugal rights	Yes	Yes (for joint lives)	No	No
(e) husband's wilful neglect to provide reasonable maintenance for wife or children.	Yes	Yes (for joint lives)	No	No
or				
wife's failure to maintain a destitute husband.				

²⁷ We have defined in paragraph 500 the circumstances which should entitle a husband to apply for a maintenance order against his wife on the ground of "wilful neglect to maintain".

²⁸ The fact that a wife has obtained a decree of judicial separation does not debar her from applying subsequently for an order for periodical payments (which may be secured) on the ground of her husband's wilful neglect to provide reasonable maintenance (*King v. King*, [1954] P. 55).

²⁹ We contemplate that the court should retain its present power to order alimony pending suit.

521. The different descriptions which are given to the provision awarded by the court are sometimes confusing, as several witnesses pointed out. We suggest that in any future statute an order that one spouse should make periodical payments out of his or her income to the other spouse should be referred to as an "order for maintenance", qualified where appropriate by the words "interim" or "pending suit", and that an order that such payments should be secured should be referred to as an "order for secured maintenance"; further, that the description "maintenance" should apply to payments to be made in this way both during the marriage and after it has ended, and whether under an order of the High Court or of a magistrates' court.

Award against estate of deceased spouse

522. Maintenance payments made to a wife under an order of the court cease on the death of the husband or former husband, except where the marriage has been dissolved or annulled and the wife has obtained an order for a secured provision for her life. Where the marriage was still existing at the time of the husband's death the wife has the rights conferred by law on a married woman in respect of her husband's estate. Thus, she may claim under the Inheritance (Family Provision) Act, 1938, on the ground that his will does not make suitable provision for her, or, if he died intestate, she will inherit the share of his estate due to her under the law governing intestate succession. If the marriage had been dissolved or annulled, the wife has no similar rights in respect of her former husband's estate, nor does her right to apply for provision to be made for her consequent upon the divorce or annulment carry over against the estate³⁰.

523. Several witnesses drew attention to the hardship which can arise when a wife who has been entirely dependent on the maintenance her husband has been paying her, is left destitute on his death. It may well be that, although she was not able to obtain secured maintenance at the time of the divorce because he had then no resources beyond his earnings, yet, unknown to her, he has later acquired substantial capital upon which she has no claim.

524. We consider it reasonable that the deceased's estate should be made liable for the support of a former spouse in such circumstances. The position is similar to that arising on an application under the Inheritance (Family Provision) Act, 1938. There is the same need to give careful consideration not only to the interests of the applicant but also to the interests of the deceased's dependants and the person or persons who apart from any order of the court would be entitled to the property under the terms of the will or in accordance with the law of intestate succession. We recommend, therefore, that where the marriage has been dissolved or annulled and one spouse has since died, the other spouse should have the right to apply for provision to be made for her or him out of the deceased's net estate and the court should have power to make such order as it thinks fit. The court should be able to order that periodical payments be made out of income from part of the estate, such payments ceasing on the re-marriage or death of the person to whom they are to be made, or that a lump sum payment be made out of the capital. A spouse should be able to apply whether or not an order for maintenance has been made against the deceased spouse in his or her lifetime,

³⁰ *Dipple v. Dipple*, [1942] P. 65. But when an order for a secured provision has been made and the subject matter to be provided as security has been agreed upon in the husband's lifetime, the court will require his legal personal representatives to execute the necessary deed to give effect to the court's order, *Hyde v. Hyde*, [1948] P. 198; see also *Mosey v. Mosey and Barker*, [1955] 2 W.L.R. 1118.

but if no order has been made, then the reason why no application was made, or why, if made, it was refused, would be one of the matters to be taken into consideration by the court. In our opinion, the court should also be guided by the same general principles which relate to applications under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, in so far as such principles are appropriate.

525. In making this recommendation we may be thought to depart from the terms of our reference, which expressly exclude a consideration of the law relating to the property rights of husband and wife after the termination of the marriage by death. We consider, however, that the matters we have touched upon are an integral part of the structure of the law which in our opinion should govern relations between husband and wife after the making of a decree or order in matrimonial proceedings.

Award against estate of missing spouse

526. At present, if a man disappears without making provision for his wife and children, the court is usually unable, on an application by the wife, to order that provision be made out of his property for her maintenance, or for that of the children, because of the various conditions requiring that notice of the application be given to the person whose property will be affected by the order. In the special case where it can be shown to the satisfaction of the court that the facts are such that the missing person may be presumed to be dead, the wife may be able to get at the funds but the necessary proof may not always be available until some time has elapsed. During the interval the wife may suffer considerable hardship if she has no private means and is unable to support herself by her own earnings.

527. In Scotland, there is a procedure by which a factor *loco absentis* can be appointed by the court to manage the estate of an absent person, for the benefit of the absentee or third parties, or both³¹. The absentee must be known, or if missing be presumed, to be alive and he must have left no mandate or authority for the management of his estate.

528. We consider that it would be useful for the court in England to have a power of a similar nature so that a wife should not be left destitute if her husband goes off and his whereabouts cannot be traced. We contemplate, however, that before making an order the court would have to be fully satisfied that, if the husband were available, he would be required to support his wife.

529. We recommend, therefore, that the High Court should be given power, on being satisfied that the husband is missing and cannot be traced, to order, if it thinks fit in all the circumstances of the case, that provision be made for the wife and children out of the income from the husband's property, and for that purpose to appoint a receiver to his estate. We recommend also, with one dissentient³², that the court should have the further power, if it is shown that the income from the property is insufficient to support the wife and children, to direct the receiver to realise enough of the capital for that purpose. We are agreed that our recommendation should apply also to the case where the wife is missing and the husband is left without support for himself or the children. We consider that the court's powers to make an order should extend to the case where the marriage has been dissolved or annulled.

³¹ *Lunan v. Macdonald*, 1927 S.L.T. 661.

³² Sir Frederick Burrows, whose views are set out at p. 342.

530. If our recommendation is accepted, it might be for consideration whether the court should be invested with some general powers of appointing a receiver to administer the estate of a missing person, irrespective of whether he has left a spouse and children without making provision for their support, but this is, of course, clearly outside our terms of reference.

Injunctions *quia timet*

531. A husband who wishes to defeat his wife's application for maintenance may try to dispose beforehand of as much of his property as he can, for instance by transferring it out of the country or by giving it to someone who will allow him the beneficial use of it. Although Section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, confers on the court power to grant an injunction in all cases in which it appears to the court to be just and convenient so to do, the court has refused to exercise this power against the husband unless the wife has first established a right to relief by obtaining a maintenance order³³. Even then, it would appear that the court will grant an injunction only if the payments under the order are in arrear; it will not protect payments to be made in the future since these may never become due³⁴. Moreover, the court has no power to set aside a settlement made by the husband on some third person before the wife had obtained a maintenance order³⁵.

532. Several witnesses said that the law as it stands gives inadequate protection to a wife who intends to apply for maintenance, since the husband can make away with his assets before the order is made and she is powerless to prevent him. They proposed, therefore, that the court should be given power to grant an interim injunction, on the application of the wife, to restrain the husband from thus rendering useless her right to apply for maintenance. One witness went further in suggesting that the court should also have power to set aside any disposition of his property made by the husband with that object in view. The Gorell Commission put forward a proposal on lines similar to those of the witnesses³⁶.

533. It does not follow that a wife's application for maintenance will always be successful, since, as we have explained, the court has a discretion in the matter and it will take into consideration her own means and her conduct. The principle hitherto followed by the court is that a litigant should not be "entitled as of right to have his rights safeguarded before an order has been actually made on the principle of *quia timet*"³⁷. We do not propose to challenge this principle. We are unable, therefore, to accept that the court should be given power to grant an injunction to restrain a husband from disposing of his assets before his wife, or former wife, has obtained an order of the court establishing his liability to provide for her.

534. We consider, however, that once a wife has obtained an order, she should be given a remedy against her husband if he has taken steps to dispose of his property in order to frustrate her claim. The power of the court to grant an injunction is of no avail if the husband has already transferred his property. The court has certain powers at the present time to set aside fraudulent dispositions of property, for instance those made by a bankrupt in order to defeat his creditors. We can see no reason why the court should not similarly be able, if it thinks fit, to re-open transactions made by a husband to defeat his wife's application for maintenance. We

³³ *Burmester v. Burmester*, [1913] P. 76; *Scott v. Scott*, [1951] P. 193.

³⁴ *Fanshawe v. Fanshawe*, [1927] P. 238.

³⁵ *Jagger v. Jagger*, [1926] P. 93.

³⁶ Cd. 6478, paragraph 441.

³⁷ *Jagger v. Jagger*, [1926] P. 93, at p. 101.

recommend, therefore, that a wife should be able to apply to the High Court, on or at any time within one year after the making of an order for maintenance, secured maintenance or a lump sum payment, for an order setting aside any disposition of his property made by her husband, or former husband, within a period of three years before the making of the order for maintenance; the court should have power to make such an order if the disposition of his property is shown to have been made for the purpose of defeating the wife's claims. We do not, however, intend that the rights of a *bona fide* purchaser for value should be defeated. We consider that where a husband has obtained an order that his wife should provide for him, he should be able to make a similar application to the court.

ALIMENT AND LEGAL RIGHTS: SCOTLAND

THE PRESENT POSITION

535. In Scotland, as in England, the common law rule is that during the marriage the husband is legally bound to provide his wife with all the necessities of life on a scale suitable to his degree and estate or to the style in which he has chosen to live. The fact that the husband and wife are living together raises a presumption that the husband assents to contracts made by the wife as his agent for household necessities. If the wife is deserted or compelled by her husband's cruelty or adultery to leave him, she ceases to act as his agent, but, since he is still liable to maintain her, if he fails to supply her with necessities, any person who does so will be regarded as acting as the agent of the husband for that purpose and is entitled to claim from him payment for the goods supplied. The position is the same if the wife has left the husband by an agreement which expresses or implies his liability to continue to maintain her. The adultery of the wife has been held not to terminate the husband's liability³⁸, but if the wife leaves the home unjustifiably, and refuses his offer to take her back, he is not liable to pay her a separate aliment, nor is he liable if she has sufficient means of her own to support herself, or if the marriage is dissolved or a nullity. Failure to provide her with necessities without just cause, and when he is able to do so, may, if injury to health results or is to be apprehended, amount to such cruelty as will entitle her to raise an action of separation and aliment (or of divorce).

536. The power of the court in Scotland to order a husband, on the application of the wife, to pay aliment to her is not statutory³⁹, as in England, but rests on the common law rule as to his liability. If matrimonial proceedings are being taken by either husband or wife, and the wife is not able to support herself, the court will recognise that she is entitled to live separate from her husband, and, therefore, to receive interim aliment from him, until such time as the merits of the case have been determined. The court will refuse an order if the wife continues to live in the home⁴⁰. On the making of a decree of adherence against the husband, he may be ordered to pay aliment to his wife until such time as he obeys the decree. He is also liable to support her after a decree of separation, even if the decree has been made against her on the ground of her adultery or cruelty⁴¹, and the court may make an order for aliment in her favour.

³⁸ *Milne v. Milne* (O.H.), 1901, 8 S.L.T. 375.

³⁹ Except in so far as the jurisdiction of the Sheriff Court in actions of adherence or separation is founded on statute.

⁴⁰ *M' Donald v. M' Donald*, 1875, 2 R. 705.

⁴¹ *Nisbet v. Nisbet*, 1896, 34 S.L.R. 229.

537. The award of aliment is within the discretion of the court in the sense that the court will not make an order if the wife is otherwise adequately provided for. The fact that she has property of her own or that she is earning wages will be taken into consideration, as will also the fact that she is capable of earning and has previously done so. She will not be expected, however, to take to some occupation merely to lessen the husband's liability, if she has not worked previously. The amount of the award is determined on the principle that the wife is entitled to be supported in a position commensurate with her husband's fortune and she may, therefore, apply for an increase in the amount payable if he prospers; correspondingly, if he falls on hard times, the amount may be decreased.

538. It may be that there is a liability imposed by the common law on a wife to support her husband, if he is destitute⁴², but in any event the Married Women's Property (Scotland) Act, 1920, now places a statutory duty on the wife to provide for her husband if he is unable to support himself and if she has means more than sufficient to support herself⁴³.

539. The provisions of the National Assistance Act, 1948, apply to Scotland as well as to England (see paragraphs 470-471).

540. The substantial difference between English and Scots law is in the nature of the provision which is made for the wife or husband after a decree of divorce. In Scotland, the court has no power to order financial provision to be made for one or other of the parties save in the case of a divorce granted on the ground of incurable insanity. The obligations of marriage are regarded as having terminated with the dissolution of the marriage. The innocent spouse is entitled, however, to claim his or her legal rights as if the guilty spouse had died on the date of the decree, unless they have been renounced on or during the marriage. A guilty spouse forfeits any provision in his or her favour (so far as is necessary to benefit the innocent spouse) under a marriage settlement and the innocent spouse may take any benefit under the settlement as if the other spouse were dead.

541. The legal rights to which an innocent wife is entitled are *jus relictæ* and terce. The former consists of one-third of her husband's free moveable estate, if he leaves children by that or a previous marriage, or one-half, if there are no children surviving; the latter consists of a liferent of one-third of the free income of his heritable property. An innocent husband may claim courtesy. This is a liferent of the whole of the income of any heritable property of the wife, but is subject to the condition that a child of the marriage has been born alive⁴⁴ and that child is the wife's heir. The Married Women's Property Act, 1881, gave a husband the right, on his wife's death, to one-third (or one-half as the case may be) of her free moveable estate. This is known as *jus relictî*. Possibly as the result of a legislative oversight, he cannot, however, claim *jus relictî* on divorcing his wife. If decrees of divorce have been pronounced against both parties in cross-actions, each forfeits legal rights in the property of the other.

⁴² *M'Laine*, Hailes 1013; see *Fraser on Husband and Wife*, p. 837 (Vol. I, 1876).

⁴³ Section 4 of the Act reads:

"In the event of a husband being unable to maintain himself, his wife, if she shall have a separate estate, or have a separate income more than reasonably sufficient for her own maintenance, shall be bound out of such separate estate to provide her husband with such maintenance as he would in similar circumstances be bound to provide for her, or out of such income to contribute such sum or sums towards such maintenance as her husband would in similar circumstances be bound to contribute towards her maintenance."

In *Adair v. Adair*, 1924 S.C. 798, a husband was granted an order for interim aliment in an action of separation at the instance of his wife. See also *Adair v. Adair*, 1932 S.N. 47 and 69.

⁴⁴ It must have been heard to cry.

542. A husband or wife who obtains a divorce on the ground of the other spouse's incurable insanity is not entitled to claim legal rights. Provision is, however, made for the insane spouse. Section 2 (2) of the Divorce (Scotland) Act, 1938, allows the court to make such order as it thinks fit having regard to the means of both parties, for the payment by the pursuer, or by his executors, of a capital sum or a periodical allowance to or on behalf of the defender.

543. When an action for declarator of nullity has been raised, the court will usually grant interim aliment to the wife pending proceedings but this ceases and no claim for aliment is competent after decree of nullity. Since, on the granting of a decree, the marriage is regarded as null and void *ab initio*, neither husband nor wife is entitled to claim any rights in the property of the other, and each must give up, so far as he or she can, property which belongs to the other.

EVIDENCE

544. We had no evidence to suggest that there is any dissatisfaction in Scotland with the present principles governing the liability of husband and wife to support each other during the marriage. On the other hand, most of our Scottish witnesses criticised the position which arises on divorce and put forward proposals for replacing, or supplementing, the present system of legal rights on divorce by a system under which the court would have a discretion to order the guilty spouse to make provision for the innocent spouse out of his or her income or capital. At the same time, however, it is clear that a group within the Scottish legal profession holds strongly the view that no fundamental change in the law is required.

545. The system of legal rights on divorce was one of the matters reviewed by the Committee of Inquiry into the Law of Succession in Scotland, under the chairmanship of the Hon. Lord Mackintosh, M.C., LL.D.⁴⁵. The Committee received and heard a great deal of conflicting evidence on this matter. The arguments which were put before it are much the same as those which were given to us and have been admirably summarised in the Committee's Report, as follows:

"On the one side it was contended that the present system of awarding legal rights to the innocent spouse on divorce should be retained subject only to one alteration, namely, that a husband who divorces his wife should be entitled to *jus relict*i out of her estate—a right to which he is not entitled at present. It was argued that the rule which made legal rights exigible on divorce and not only on death was deeply embedded in our law, had the sanction of long-established practice and that no sufficient case had been made out for changing it. It was also pointed out that if it was to be left to the Court to adjust in every case the provision, if any, to be made for the divorcing spouse out of the other's estate, this would, or might have, the unfortunate and highly undesirable effect of leading to almost every case of divorce, which might otherwise have been undefended, being defended on the matter of the divorcing spouse's provision. On the other side it was urged that to treat divorce as equivalent to death is an extravagant fiction and that in any event, seeing that the circumstances in which the innocent spouse may be left on divorce will vary greatly in different cases, it would be better and more just that the relief to be given to the innocent spouse should be adjusted by the Court according to the needs of the particular case rather than as at present to apply a uniform rule to every case and give to the divorcing spouse the legal rights to which he or she would

⁴⁵ Cmd. 8144, 1951.

be entitled in the event of the other's death. It was further pointed out that as the result of modern taxation the rule of treating divorce as the equivalent to death for the purpose of the emergence of legal rights has ceased to produce the result which it was intended to bring about, namely, to put the divorcing wife in substantially the same financial position as on her husband's death. A divorcing wife in many cases now gets a great deal more than she would have got if the marriage had been dissolved by death, because, while on death her husband's estate would have been subject to heavy death duties before payment of her legal rights, on divorce there is no such prior charge on the estate and the amount of her legal rights are correspondingly increased. Another consideration to be kept in view is that in many cases the divorced spouse may have little or no capital but be possessed of a good income, or again in a case where the spouse may have some capital he or she may in contemplation of divorce proceedings divert it into a form where *jus relictæ* (i) will not be exigible from it. In such circumstances, for example, a wife's legal rights would be worthless and it is undoubtedly the case that in Scotland a wronged wife is often prevented from seeking the divorce to which she is entitled, because she would be left entirely unprovided for."

546. The Mackintosh Committee took the view that on balance "the considerations in favour of adopting a system similar to that in use in England, whereby the relief to be given is adjusted according to the circumstance of each particular case, outweigh those in favour of retaining our existing system of making legal rights exigible on divorce as well as on death". Accordingly the Committee recommended:

"That on divorce the innocent spouse should no longer be able to claim legal rights out of the other spouse's estate but that it should be left to the Court in each case to adjust the nature and extent of the provision, if any, to be made for the innocent spouse and that the Court should have power to make such provision either by way of a capital sum or by annual payment or partly by the one and partly by the other as might seem best to the Court in the circumstances of the particular case, and on a change of circumstances to vary or terminate the provision so made."

547. A substantial number of our Scottish witnesses submitted proposals either specifically in support of, or similar in effect to, the Mackintosh Committee's recommendation. They appeared to contemplate that the husband should be given the same right of application as the wife; some in fact expressly mentioned that point.

548. Other witnesses were also of the opinion that the present system is faulty but suggested that the system of legal rights should be retained and that in addition the court should be given a discretion on the lines of the Mackintosh Committee's recommendation. Two of these witnesses considered that the two remedies should be mutually exclusive, and that the innocent spouse should have the right to elect which to take. The third took the view that legal rights should always be exigible but that the court should have a discretion to make further provision where the legal rights were virtually worthless to the innocent spouse.

549. Several witnesses proposed that a spouse who obtains a decree of divorce on the ground of incurable insanity should be able to apply to the court for provision to be made for him or her out of the estate of the defender. It was said that the estate of a husband defender, for instance, may well be more than sufficient to supply his needs and the wife pursuer will suffer hardship by having substantially to reduce the standard of life to which she was accustomed during marriage.

THE COMMISSION'S RECOMMENDATIONS

Aliment during the marriage

550. There is little doubt, in our opinion, that actions for separation and aliment or adherence and aliment are often brought by wives for the primary purpose of obtaining financial provision. We think that in those circumstances the wife should be able to obtain an order of the court as quickly and inexpensively as possible, and we are recommending elsewhere (see paragraph 976) that a procedure should be introduced in Scotland whereby the Sheriff Court can deal with such actions in a simplified manner, comparable with the procedure followed in the Small Debt Court.

551. We are agreed that there are two instances in which a wife who would have no ground for raising an action for adherence or separation, should be able to claim aliment from her husband. In the first place, we have recommended elsewhere (see paragraph 164) that in an action for divorce on the ground of desertion the pursuer should not be required to aver that he or she has been willing to adhere during the whole of the period of desertion. But if a husband fails to provide for the wife whom he has deserted and she is unwilling to bring an action of adherence, she will be unable to obtain aliment until she can start divorce proceedings. There is a similar position if a wife has been forced to leave the matrimonial home by reason of her husband's conduct. After she has lived apart from her husband for three years, she will be able, under our majority recommendation, to obtain a divorce on this ground (see paragraph 170) but during the intervening period her right to aliment may be in doubt. We recommend, therefore, that where a wife shows to the satisfaction of the court that she has been deserted or that she has been compelled to leave the matrimonial home by conduct of a grave and weighty nature on the part of her husband which is such that she could not in the face of it reasonably be expected to continue with the conjugal life, she should be entitled to apply to the Sheriff Court (if appropriate, under the new simplified procedure) or to the Court of Session for aliment. We think that the husband should also be given the right to apply for aliment in like circumstances if he is unable to maintain himself (see paragraph 538).

552. Our view on the extent to which the court should take into account the potential earning capacity of the wife is the same as that which we have expressed when dealing with England (see paragraph 493).

Financial provision after the marriage has ended

553. We are satisfied that the system of legal rights on divorce has material defects, of which the chief is that if the guilty spouse has no means apart from what he earns, legal rights are valueless to the innocent spouse. We recommend, with two dissentients⁴⁶, that legal rights on divorce should be abolished and that, instead, the proposal put forward by the Mackintosh Committee (see paragraph 546) should be adopted, but with the proviso that if a spouse marries again after divorce he or she should cease to have any claim against the other spouse for financial provision⁴⁷.

⁴⁶ Lord Keith of Avonholm and Mr. Young, who are in favour of giving the innocent spouse the right to choose between claiming legal rights and applying to the court for financial provision to be made for him or her. They consider, however, that the defender should be able to resist the pursuer's claim for legal rights on the ground that if they were exacted hardship would arise; if the objection were sustained resort could then be had to a claim for financial provision. They also consider that a husband's legal rights on divorce should include *jus relicti*.

⁴⁷ We consider that the discharge of an existing order by re-marriage should be subject to any agreement between the parties to the contrary (see paragraph 496).

554. If legal rights on divorce are abolished, a new situation will arise with regard to marriage settlements, since the guilty spouse will no longer forfeit his rights under the settlement to the benefit of the innocent spouse. We consider that after a decree of divorce the court should have power, on the application of either party, to vary the terms of any settlement made in contemplation of or during the marriage, so that the situation can be reviewed in the light of the altered circumstances. This power has proved to be of great value in England. We recommend accordingly (with one dissentient⁴⁸).

555. Where a divorce has been granted on the ground of the defender's incurable insanity, Section 2 of the Divorce (Scotland) Act, 1938, bars the operation of legal rights in respect of either spouse and gives the court power to make an order for the maintenance of the defender. We consider that the court should continue to have this power but we recommend that it should also have power to order provision to be made for the pursuer (and for the children, if any).

556. We have recommended in respect of England that when, after a divorce, one spouse has died, the other spouse should be able to apply to the court for provision to be made for her or him out of the deceased's estate (see paragraph 524). We think that the court in Scotland should have power to make an order in such circumstances in favour of an innocent spouse; and we recommend accordingly. The court can already make an order against the pursuer's executors in favour of a defender in the special case where the marriage has been dissolved on the ground of the defender's incurable insanity and the pursuer has since died.

557. As we have said (in paragraph 543), it is a rule of Scots law that neither party to a marriage which has been declared null and void can claim that the other should make provision for his or her support in the future. We consider that this rule may operate harshly, particularly against the woman, if, for instance, the parties have lived together for a number of years on the footing of man and wife. We recommend, therefore, that on or after decree of nullity, the court should have power to make a provision for either of the parties by way of a capital sum or periodical payments or both. The court should have a wide discretion to grant or to refuse aliment in the particular circumstances of the case. It may not be reasonable, for instance, to give aliment if the marriage has lasted for only a short time. Nor need the award of aliment be confined to the pursuer. The pursuer may be the person responsible for the nullity, for example by reason of his bigamy or impotency, and the court should then be able to grant relief in appropriate cases to the defender on his or her application.

558. In England, as we have said, the court will not restrain a husband from dealing with his property in such a way as to defeat a claim for maintenance by his wife, or former wife, if no order has yet been made, nor has it power to set aside any disposition made by him for that purpose. In Scotland, also, a wife who has raised an action of adherence and aliment, or separation and aliment, cannot use diligence during the proceedings for the enforcement of her claim for aliment. Where, however, the husband is on the verge of bankruptcy or is disposing of his property with the intention of leaving the country, that rule may be departed from and the husband by appropriate diligence may be restrained from disposing of his property⁴⁹.

⁴⁸ Lord Keith of Avonholm is unable to agree with this recommendation in so far as it introduces into the law of Scotland power to vary the rights of children under a marriage contract for the reasons:

(i) that children's rights are never dealt with on divorce under the present law;

(ii) that in so far as the power is exercised to vary children's provisions it may be used to deprive children of rights indefeasibly vested in them under the marriage contract.

⁴⁹ *Symington v. Symington*, 1875, 3 R.205; *Burns v. Burns*, 1879, 7 R.355; *Millar v. Millar*, (O.H.) 1907, 15 S.L.T. 205.

Apart from this, a husband has an absolute and unqualified right to dispose of his moveable estate by an *inter vivos* deed, even if this is done expressly to diminish the fund available on divorce for the wife's *jus relictæ*, provided that it is not a simulate deed which, in effect, leaves him in enjoyment of the property. In that event, the disposition may be reduced as being in fraud of the *jus relictæ*⁵⁰.

559. We think it desirable that there should be a remedy to meet the case where a spouse has disposed of his property in order to defeat the other spouse's claim to financial provision, and we recommend therefore that in those circumstances the court should have the same power to re-open the transaction as that which we are recommending should be given to the court in England (see paragraph 534).

MAINTENANCE FOR CHILDREN: ENGLAND AND SCOTLAND

Liability of parents

560. In England, the liability of a parent to maintain his or her child arises, not under the common law, but under various statutory provisions, each dealing with one particular aspect of the matter. Sometimes the mother and father are under an equal liability, sometimes only the father can be made liable, and in other cases each may be made liable but to a varying degree.

561. If, in proceedings in a magistrates' court under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, the custody of the children has been given to the wife, the court can order the husband to pay to her a weekly sum not exceeding £1 10s. a week for each child. The court has no power to order a wife to contribute to the support of the children, if the custody has been given to the husband.

562. In respect of matrimonial proceedings in the High Court, Section 26 (1) of the Matrimonial Causes Act, 1950, provides that:

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings . . ."

Section 26 (2) confers a similar power in proceedings for restitution of conjugal rights. Other Sections of the Act of 1950 provide that the court may order (i) a husband to make a secured provision for the children after a decree of divorce or nullity of marriage; (ii) a wife who has had a decree of divorce or judicial separation pronounced against her on the ground of her adultery, cruelty or desertion, to make a settlement of her property in favour of the children; (iii) a wife who has disobeyed a decree for restitution of conjugal rights to settle her property or to make periodical payments for the benefit of the children. Moreover, after a decree of divorce or nullity of marriage the court may vary for the benefit of the children any ante-nuptial or post-nuptial settlement.

563. In the exercise of the wide powers conferred on it by Section 26 (1) the court will order a husband to make periodical payments for the maintenance of the children. There is, however, only one reported case where the court has made a similar order against a wife⁵¹. In that case, the court

⁵⁰ *Allan v. Stark* (O.H.), 1901, 8 S.L.T. 468; *Rowley v. Rowley*, 1917, 1 S.L.T. 16.

⁵¹ *Hering v. Hering and Wilson*, [1943] 2 All E.R. 424.

took the view that the Sections of the Act which specifically make a wife liable to provide for her children "pointed to the conclusion that the legislature intended that a guilty wife who was possessed of separate estate should, in an appropriate case, be ordered to pay maintenance for the benefit of the children of the marriage", and that the terms of Section 26 (1) were wide enough to enable it to make an order for periodical payments against the wife.

564. In Scotland, the common law imposes upon the parents the liability to aliment their children in so far as they are able. The father is primarily liable, but if his means are insufficient, the obligation falls on the mother. The Inner House of the Court of Session exercises jurisdiction to deal with petitions for the custody of children by virtue of its *nobile officium*. The jurisdiction of the Outer House is derived from Section 9 of the Conjugal Rights (Scotland) Amendment Act, 1861, which provides that in any action for separation or divorce the court may make such provision as it thinks just for the custody, maintenance and education of any children of the marriage. The Section does not give the Court of Session any greater powers than those it has already under the common law⁵². Accordingly, it would seem that the court will not order the wife to aliment any children, the custody of whom has been given to the husband, unless he is unable to provide for them.

565. In other statutes, which are applicable to both England and Scotland, no distinction has been made between the mother and the father and both are equally liable for the support of their children. Thus, Section 42 of the National Assistance Act, 1948, provides that a man and a woman are liable to maintain their children and proceedings under Section 43 may be taken against either by the National Assistance Board to recover the cost of assistance. Again, Section 24 of the Children Act, 1948, makes the mother and the father of a child committed to the care of a local authority both liable to contribute to the child's maintenance.

566. A number of witnesses suggested that in matrimonial proceedings between husband and wife, the court should have a general discretion to order the wife, as well as the husband, to contribute towards the support of the children. Most of them had in mind the case where the wife has gone off, leaving the husband to look after the children; they considered that, if the wife is earning, the husband should not have to bear the entire burden of the children's support.

567. While husband and wife are living together, it usually happens that both help to support the children in proportion to their respective means. The wife's contribution will, of course, often consist of looking after the children in the home. We can see no reason why the separation of husband and wife should in any way lessen the contribution to be made by either. We think, therefore, that, on the application of the husband or a third person who has been given custody of the children by order of the court, the court should be able to order the wife to pay for their maintenance, if it thinks fit, just as it will now make an order against the husband.

568. We recommend, therefore, that in England and Scotland the principle that husband and wife are jointly liable for the maintenance of the children should be followed in any matrimonial proceedings in which the question of the maintenance of children arises.

569. The custody of children may be awarded by the court to husband or wife in proceedings taken under the Guardianship of Infants Acts, 1886 to 1925. If the wife is given custody of the children the husband may be

⁵² *Lang v. Lang*, 1869, 7 M.445.

ordered to pay maintenance for them, but the court has no power to require the wife to pay maintenance for the children if the husband is given their custody. We appreciate that a consideration of the Guardianship of Infants Acts is outside our terms of reference; nevertheless, the principle which we are recommending ought in our opinion to be extended to applications under those Acts.

The nature of the provision for children

570. We have remarked that the kind of provision which the High Court in England can order for a wife or husband depends on the nature of the matrimonial relief which has been sought (see paragraph 512). There are the same anomalies in the provision which can be made for children (see paragraphs 562-563), and we think that they should be removed. Accordingly we recommend that in matrimonial proceedings in the High Court in England:

- (i) if there has been a decree of divorce or nullity of marriage, the court should have power to make an order against either spouse in favour of the children for periodical payments or for a secured provision (up to the age of twenty-one) or for the settlement of property;
- (ii) if there has been a decree of restitution of conjugal rights or an order for maintenance on the ground of wilful neglect to maintain, the court should have power to make an order against either spouse in favour of the children for periodical payments or for a secured provision (up to the age of twenty-one);
- (iii) if there has been a decree of judicial separation or in any other circumstances (for example, if the court refuses a decree of divorce, nullity of marriage or judicial separation but makes an order for custody of the children), the court should have power to make an order against either spouse in favour of the children for periodical payments (up to the age of twenty-one).

The court should be able to order one kind of provision in addition to, or instead of, any other kind.

571. There is no similar problem in Scotland calling for a corresponding recommendation.

Additional classes of children for whom provision should be made

572. In England and Scotland, the court's present jurisdiction in matrimonial proceedings to order separate provision to be made for the children extends to legitimate and legitimated children of the two spouses and children adopted by the two spouses⁵³.

573. The case of *Hill*⁵⁴ was authority for saying that a magistrates' court in England could make an order against a husband for the maintenance of his wife's children by a previous marriage, but the decision in that case largely rested on the fact that the husband was legally liable to maintain such children under the poor law⁵⁵. It would seem doubtful whether that decision could stand today, at least on that basis, since Section 42 of the National Assistance Act, 1948, now confines the liability of a man to his

⁵³ See, however, footnote 4 to paragraph 393.

⁵⁴ *Hill v. Hill*, [1902] P. 140. Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, provides that a married woman may complain to a magistrates' court that her husband has wilfully neglected to provide reasonable maintenance for her or "for her infant children whom he is legally liable to maintain".

⁵⁵ Section 14 (3) of the Poor Law Act, 1930, provided that "a man who marries a woman having a child (whether legitimate or illegitimate) at the time of the marriage shall be liable to maintain the child as part of his family . . .".

own children, including any child of whom he has been adjudged the putative father. It has been said, however, that "the fact that a man marries a woman with a young child, whether he be the father of the child or not, is a matter which the court would take into consideration in awarding the woman maintenance, after a dissolution of the marriage, assuming the child was still under age and needing support"⁵⁶. On an application to a magistrates' court for maintenance, a wife who has to support a child who is not a "child of the marriage" may none the less be at a disadvantage since the most which the court can then order is £5 a week for her maintenance, whereas if the child were a "child of the marriage" it could order an additional £1 10s. a week for the maintenance of that child.

574. In Part V of our Report we have recommended that in matrimonial proceedings between husband and wife the court should concern itself to protect the interests of certain additional classes of children who are not "children of the marriage" (see paragraphs 393-394 and 417) and that it should have power to make an order for custody in respect of such children. We think that the court should also have power to order either husband or wife or both to provide for the support of children in these additional classes if it is reasonable in all the circumstances that such an order should be made.

575. Accordingly, we recommend that in matrimonial proceedings in England (in the High Court and the magistrates' court) and in Scotland (in the Court of Session and the Sheriff Court) the court should have power to order one or other spouse, or both spouses, to make separate provision for the support of the following additional classes of children:

- (i) illegitimate children of the two spouses ;
- (ii) children of either spouse (including a child adopted by either spouse), if living in family at the time when the home broke up ;
- (iii) illegitimate children of either spouse, if living in family at the time when the home broke up ;
- (iv) other children (excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up.

We contemplate that the court should have discretion to make such an order, not only where it leaves the children with the spouse who already has legal custody of them or gives the custody to one spouse or to a third person, but also where it has required a local authority to receive the children into its care (see paragraphs 395 and 417).

576. We appreciate that this proposal might be thought to depart from the trend, shown in recent legislation, to reduce the number of classes of person made liable for the support of children⁵⁷. We think, however, that where a spouse has accepted children into the family and has contributed to their support the court should have a discretion to make such order as it considers appropriate. We were in some doubt whether we should include in our recommendation the children in class (iv) but, on balance, we think that this would be desirable. We contemplate that in such cases the court would ascertain whether there was a natural parent living who could support the child and that the court would also take into consideration how long the child had been a part of the family.

⁵⁶ *Harrison v. Harrison*, [1951] P. 476, at pp. 481-482.

⁵⁷ Compare Section 14 (3) of the Poor Law Act, 1930, with Section 42 of the National Assistance Act, 1948, and Section 86 (1) of the Children and Young Persons Act, 1933, with Section 24 of the Children Act, 1948.

Provision for children undergoing further education or training

577. In England, a magistrates' court is unable to make an order for a child's maintenance if that child is sixteen years of age or more at the time of the first application (except on an application under the Guardianship of Infants Acts if the child is physically or mentally incapable of self-support). Where, however, in matrimonial proceedings between husband and wife a magistrates' court has made an order for the custody and maintenance of a child who is under sixteen years of age, application may be made for payments under the order to continue after the child has reached the age of sixteen on the ground that the child is or will be engaged on a course of education or training, and the court may order accordingly. The High Court (and the county court in proceedings under the Guardianship of Infants Acts) has power to make orders in respect of children up to the age of twenty-one.

578. It has been suggested to us that it would be desirable to extend the powers of magistrates' courts in this respect. We do not like to think that a child may be prevented from receiving further education or training because the magistrates' court has no power to make a maintenance order in his or her favour. We appreciate that an order for the maintenance of a child is at present dependent on the making of an order awarding custody, and that it might be difficult to make a custody order if the child were over sixteen, since at that age he can make up his own mind as to the parent with whom he wishes to live. We can see no reason, however, why the court should not be able to make a maintenance order alone in order to provide for the child's further education or training. Accordingly we recommend that provision should be made to enable a magistrates' court to make an order in proceedings under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, for the maintenance of a child who is sixteen years of age or over to enable the child to undergo a course of education or training, although no previous order has been made. We contemplate that it should also be possible to make an application for this purpose under the Guardianship of Infants Acts.

579. In Scotland, this problem does not arise, since children over the age of sixteen may themselves raise an action for aliment.

PART VIII

ENFORCEMENT OF MAINTENANCE ORDERS MADE IN THE HIGH COURT

580. If a husband defaults in payments under a maintenance order made by the High Court, the wife may take proceedings for enforcement directed against either his property or his person.¹ In the first place, she may apply, without notice to the husband, for the issue of a writ of execution against his property (*feri facias*, sequestration or *elegit*), or she may apply, on notice to him, for the issue of a charging order against stocks and shares in his name, or for the issue of a garnishee order in respect of debts owing to him, or for the appointment of a receiver of his property. Often, however, these methods of enforcement are useless because the husband has no property upon which they can take effect. Secondly, the wife may apply in the High Court¹ for the issue of a judgment summons, at the hearing of which the court may make either an order for the payment of the sum owing by instalments or an order committing the husband to prison for a period of up to six weeks: the issue of the committal order may be suspended on terms that he pays off the arrears by instalments and keeps up current payments under the original maintenance order. Additionally, it is open to the wife to apply for the issue of a judgment summons in the county court.

Registration in a magistrates' court of a maintenance order made in the High Court

581. The system of enforcement of orders in the High Court was much criticised by the witnesses, chiefly in respect of the judgment summons procedure. It was said to be cumbrous, ineffectual and expensive, and was unfavourably compared with the procedure for the enforcement of maintenance orders in magistrates' courts. Most of the witnesses supported a proposal, on the lines of that recommended by the Gorell Commission², that maintenance orders made by the High Court should be capable of registration and enforcement in a magistrates' court. Another suggestion was that the procedure for enforcement in the High Court should be remodelled on the lines of that in the magistrates' courts. The Denning Committee proposed that proceedings for enforcement by way of judgment summons should be brought in the county court unless a judge directed otherwise³.

582. Since the evidence was submitted, the judgment summons procedure in the High Court has been reformed by the Matrimonial Causes (Judgment Summons) Rules, 1952. As a result, much of the criticism as to delay and the ineffectiveness of the procedure has now been met. It is still true to say, however, that the procedure in magistrates' courts has advantages over that in the High Court or in the county court. It will generally be more convenient for a wife to take enforcement proceedings in a magistrates' court because the court is more easily accessible to her, she does not have to employ a solicitor and the costs are negligible. In addition, the fact that payments have to be made to the court collecting officer, instead of direct to the wife, may keep the husband up to the mark with his payments. Moreover, the fact that the collecting officer is under a duty to keep a record

¹ The jurisdiction is derived from Section 5 of the Debtors Act, 1869, which was specifically applied to proceedings relating to default in payments under an order or judgement made in a matrimonial cause by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932.

² Cd. 6478, paragraph 444.

³ Cmd. 7024, paragraph 47, Final Report.

of the payments and to notify the wife if there has been default for four weeks is likely to ensure that the wife takes proceedings for enforcement of arrears before they have mounted up to a sum beyond the capacity of the husband to pay. There cannot be any dispute over the amount of arrears since the court will have a record of the payments made. We recommend, therefore, that it should be possible for an order for unsecured maintenance⁴ made in the High Court to be registered in a magistrates' court and thereafter to be dealt with as to collection of the payments and enforcement of arrears in exactly the same way as if it had been made originally by a magistrates' court.

583. Magistrates' courts may not make a maintenance order for an amount exceeding £5 per week for a wife and £1 10s. per week for each child. We think that a maintenance order made by the High Court for an amount within these limits should be sent as of course for registration in the appropriate magistrates' court, unless the High Court directs to the contrary. Either party should be allowed to put before the High Court reasons why the order should not be so registered. For instance, the husband may have resources which could be got at by a method of enforcement not available in a magistrates' court; or both parties may prefer that payment should be made without the intervention of a magistrates' court.

584. We consider that as a general rule it would be undesirable for a magistrates' court to have to deal with a High Court maintenance order for an amount which it has no power to order itself. We appreciate, however, that there may be circumstances in which it would be appropriate for an order in excess of these amounts to be registered. For instance, maintenance for a wife may be ordered for an amount below £5 per week, while maintenance for the child may be ordered for an amount in excess of £1 10s. per week. We think it undesirable that the two orders should be treated differently and the particular circumstances should determine whether or not both orders should be registered. Accordingly, we propose that the High Court should have power at the time of making a maintenance order for an amount in excess of £5 per week for a wife or £1 10s. per week for a child to direct that the order should be registered in the appropriate magistrates' court.

585. Where a maintenance order has not been registered in a magistrates' court immediately after it was made, it should be open to either party to apply to the High Court at any later date for the order to be registered. It should also be possible for either party to apply to the High Court or to the magistrates' court in which a maintenance order has been registered for the order to be taken off the register. For instance, the applicant may think that proceedings for enforcement in the High Court would be more successful in the circumstances or may intend to apply for the amount payable to be increased to a sum beyond the limit of the jurisdiction of a magistrates' court (see paragraph 586). Moreover, if at any stage in proceedings for the enforcement of an order registered in a magistrates' court, that court considers that it would be more convenient for the proceedings to be carried on in the High Court, it should have power to send the order back to the High Court.

586. It was suggested to us that a magistrates' court should not have power to vary or discharge a High Court maintenance order which has been transferred to it. Often, however, the question of variation arises in the course of proceedings for enforcement and it would cause inconvenience to the parties and delay if the application for variation had to be made to the High

⁴ This includes orders for alimony pending suit, permanent alimony and periodical payments, as well as maintenance orders.

Court. We propose, therefore, that an application to vary or discharge a High Court maintenance order which has been registered in a magistrates' court should, with one exception, be made in the first place to a magistrates' court in accordance with the procedure which at present governs applications for variation or discharge of orders made in a magistrates' court. The exception is where the amount which the court is to be asked to order is beyond the limit of the jurisdiction of a magistrates' court. In that case, the order should be sent back to the High Court and the application for variation made to that court (see paragraph 585). On the hearing of a summons in the magistrates' court for variation or discharge, the magistrates' court should, however, have the additional power to send the order and application back to the High Court if it thinks fit; for instance, where a complicated investigation into the financial position of the parties is necessary.

587. An application to vary or discharge a High Court maintenance order which has not been registered in a magistrates' court should be made, as at present, to the High Court. If, however, the application results in the amount payable being reduced to an amount within the power of a magistrates' court to order, then the order should be registered as of course, unless the High Court directs otherwise. Even if the amount is not so reduced, it would of course still be possible for the court to direct that the order be registered, on the application of either party (see paragraph 585).

588. If our proposal is adopted, it seems to us only right that a wife who has already obtained a High Court maintenance order should be able to take advantage of the procedure for collection and enforcement available in a magistrates' court if she so wishes. We therefore propose that any person who has in the past obtained a High Court maintenance order should be allowed to apply (by summons to a registrar of the Divorce Division and on notice to the person who has been ordered to make the payments) for the order to be registered in the appropriate magistrates' court.

589. There is one further point which arises out of our recommendations. All maintenance orders made in magistrates' courts are for the purposes of income tax classed as "small maintenance orders". The order is silent as to tax and the husband pays the wife the amount named in the order in full and is entitled to deduct the whole of the amount from his income for the purpose of his assessment to income tax, such amount being directly chargeable to tax in the wife's hands. In the High Court, the procedure in respect of "small maintenance orders" applies only to orders for the wife up to £2 per week and for a child up to £1 per week. Orders for amounts over these limits are made "less tax" or "free of tax". The "small maintenance order" system greatly simplifies the position of the parties with regard to income tax. So far, High Court orders have not been put on the same footing as orders made by a magistrates' court. However, if it is to be possible for maintenance orders made in the High Court to be transferred to a magistrates' court it would be anomalous for this difference to continue and we recommend that steps should be taken to make High Court orders subject to the same rules with regard to the payment of income tax as magistrates' courts' orders.

Burden of proof of means to pay

590. The power of the High Court (and the county court) to commit a person to prison for non-payment of a debt may only be exercised when it is proved to the satisfaction of the court that the debtor has or has had since the date of the order the means to pay the sum in respect of which he is in default, and has refused or neglected, or refuses or neglects, to pay

it⁵. The burden of proof, therefore, lies on the creditor. In proceedings for the enforcement of a maintenance order in a magistrates' court, however, the burden of proof lies on the husband to satisfy the court that his failure to pay was not due to his wilful refusal or culpable neglect⁶. We were told that the procedure in the magistrates' court works very well. On the other hand, it was said that in proceedings in the High Court or county court it was often impossible for a woman to prove that her former husband was wilfully defaulting, since she could not find out what he was earning, or what other means he had. We recommend, therefore, that in proceedings by way of judgment summons in the High Court or the county court for the enforcement of a maintenance order made in the Divorce Division, the burden of proof should rest on the debtor, as in proceedings for enforcement in the magistrates' courts, to show that his failure to pay was not due to his wilful refusal or culpable neglect.

Issue of writs of execution

591. Rule 62 of the Matrimonial Causes Rules, 1950, provides that in default of payment to any person of any sum of money at the time appointed by any order of the court for its payment, a writ of *fiery facias*, sequestration or *elegit* is to be sealed and issued as of course out of the Divorce Registry (or district registry) upon an affidavit of service of the order and of non-payment. It has been said that this practice, when applied to the enforcement of arrears under a maintenance order, gives the husband no opportunity to oppose the issue of the writ, although he may at that time be seeking a variation of the order for maintenance, or he may not admit the arrears.

592. We think it undesirable that a wife should have to give notice to her husband that she is intending to apply for execution against his property for arrears of maintenance. The whole purpose of this summary remedy would be defeated, since the husband would be given the chance to withdraw his property from the reach of the sheriff's officers. If execution is wrongly levied, then the husband has a remedy in proceedings for wrongful distraint. Nevertheless, we think that the court should be given a discretion with regard to the issue of the writ if, at the time of application for its issue, there is an outstanding application for variation or discharge of the order for maintenance. The court can, and frequently does, order that the variation or discharge be dated back to whatever is thought to be the appropriate date. Thus, execution may be levied in respect of arrears which the court may later treat as not having accrued. We recommend, therefore, that the court should have a discretion to refuse an application for the issue of a writ of execution in the circumstances we have described.

Recovery of arrears of maintenance from the estate of a deceased person

593. If a person who has been ordered to pay maintenance by the High Court dies, arrears which have accrued up to the time of his death cannot be recovered from his estate⁷. The basis of the rule is that an order for maintenance does not create a legal debt, but merely a liability to pay, which lasts only during the lifetime of the person bound by the order and the extent of which can be adjusted by the court at any time during that period. It can be enforced, therefore, only in the manner provided by statute, which makes no provision for the recovery of arrears from a deceased's estate.

⁵ Section 5 (2), Debtors Act, 1869.

⁶ Section 74 (6), Magistrates' Courts Act, 1952.

⁷ *Re Hedderwick, Morton v. Brinsley*, [1933] Ch. 669. The position is the same in respect of arrears under a maintenance order of a magistrates' court; *Re Bidie*, [1948] Ch. 697 (see paragraph 1111).

594. We consider it desirable that the court should have power to direct that arrears under a maintenance order should be paid out of a deceased's estate. It may be most unjust to a wife that her husband's death should deprive her of maintenance which she would have been able to recover had he not died. On the other hand, the court should retain some discretion in the matter, since it may well be unreasonable to make the deceased's estate liable for arrears which have been allowed to accumulate for a number of years. We recommend, therefore, that where payments of maintenance under an order of the High Court in matrimonial proceedings are in arrear at the date of death of the person who has been ordered to make them, the court should have power, on the application of the person to whom the payments were due, to order that the sum owing be treated as a legal debt against the deceased's estate, if it considers this reasonable in all the circumstances.

PART IX

PROPERTY RIGHTS BETWEEN HUSBAND AND WIFE

THE PRESENT LAW: ENGLAND

GENERAL POSITION

During marriage

595. The broad result of the common law doctrine that husband and wife are one person in law was that marriage operated as an assignment to the husband of the wife's property, whether owned by her at the time of the marriage or acquired later. Her money and personal chattels became his absolutely as also did debts owing to her if he chose to secure them by action. Her leaseholds would still remain in her name as lessee, but he was entitled to dispose of them and to pocket the proceeds. On her death they passed to him absolutely. Her freehold estates remained during the marriage under his sole control and would in certain circumstances pass to him for life if he survived her. Every penny of her income, whether arising from investments, land or even her own earnings, belonged to him absolutely.

596. The wife's position was gradually improved by the development in the Court of Chancery of the doctrine of the married woman's separate estate. Property which was expressly given to or settled upon a wife "for her separate use" became her own in every sense of the word. She could dispose of it in her husband's lifetime free from his control. As regards other property, the common law doctrine still applied. Then, in 1870, the wife was given by statute certain limited rights in respect of personal property; subsequently, the Married Women's Property Act, 1882 (which still governs the rights of husband and wife) substantially altered the position in favour of the wife by allowing her to retain all her property, both real and personal, on marriage and by giving her control over it, as well as over property (including earnings) which she acquired after marriage. Later legislation has removed all restrictions on the capacity of a married woman to acquire, hold and dispose of property.

597. The present position is, therefore, that on marriage each spouse now continues to own separately property which belonged to him or her before the marriage, and property acquired by one or the other during marriage remains his or her property.

On divorce

598. The dissolution of a marriage does not by itself affect the property rights of husband and wife (save that neither has any right of succession in the property of the other if the other dies intestate after the date of the divorce). As we have explained in Part VII, there is statutory provision for the court to order a settlement of the property of a wife who has been divorced on the ground of her adultery, cruelty or desertion, for the benefit of the husband or the children, and to vary ante-nuptial and post-nuptial settlements made on the parties to the marriage.

DISPUTES BETWEEN HUSBAND AND WIFE

Rights of action in tort

599. At common law husband and wife could not sue each other for a tort (since in law they were regarded as one) and this disability is preserved in substance in Section 12 of the Married Women's Property Act, 1882. One exception is allowed under the Act, namely, that a wife can sue her husband in tort for the protection and security of her own property. A similar remedy is not available to a husband (see also paragraphs 604 and 617).

Disputes over title to property

600. If there is a dispute between husband and wife over the title to property, each can apply to the court (either the High Court or the county court) under Section 17 of the Married Women's Property Act, 1882, for the summary determination of the question and the court can make such order as it thinks fit. For instance, husband and wife may each have contributed to the purchase price of the matrimonial home or the furniture. If they disagree as to the share which each should take of the proceeds of sale, the court may be asked to decide the question. It has been held that the court must try to conclude what was in the minds of the husband and wife when the property was acquired and then make an order giving effect in law to what they must be taken to have intended at the time of the transaction¹. If there is evidence from which it is reasonable to infer that the intention at the time of purchasing the matrimonial home was that each should contribute a certain proportion to the purchase price, then the parties are entitled to the proceeds of the sale in those proportions. In the case of *Rimmer*², which was also concerned with the proceeds of sale of the matrimonial home, the issue was not so simple. The wife had provided the cash for the initial deposit but the husband had made himself solely liable on the mortgage for the balance of the purchase price. Thereafter, while both had contributed towards repaying the loan, the wife had paid the larger share; this had been out of her own earnings (though at the time she was keeping herself out of her husband's allowance). The Court of Appeal decided that in all the circumstances, there being no evidence to show precisely the parties' intentions at the time the property was acquired, it would be just for the sum realised on the house (which was largely a windfall because of the post-war rise in value of house property) to be divided equally between husband and wife. The Master of the Rolls said: "Where the court is satisfied that both the parties have . . . a substantial beneficial interest, and where it is not possible or right to assume some more precise calculation of their shares, equality, I think, almost necessarily follows".

601. In the later case of *Tunstall*³, the wife made an application under Section 17 for a share in the proceeds of the sale of the home and its contents some two years after the sale had taken place. Since then the husband had spent most of the proceeds of the sale, in part in providing maintenance for the wife. The Court of Appeal held that the proceedings under Section 17 were "misconceived", since that Section was meant to deal in a summary way with questions relating to the "title to or possession of property" and did not give the court power to make a money judgment; and in the case in question there was no doubt about the husband's title to, or right to possession of, the house, or his right to sell it, and there was no specific fund in existence on which any order of the court could operate.

¹ *Re Rogers' Question*, [1948] 1 All E.R. 328 (C.A.).

² *Rimmer v. Rimmer*, [1953] 1 Q.B. 63.

³ *Tunstall v. Tunstall*, [1953] 1 W.L.R. 770.

It was the absence of a fund that was held to distinguish the case from that of *Rimmer*. To reconcile the two cases, however, it has to be assumed (though this does not appear from the report of the judgment) that the balance of the proceeds of sale in the husband's hands in the case of *Tunstall* was not identifiable amongst such other money as he possessed. If so, then jurisdiction under Section 17 will depend upon what has happened to the proceeds of sale when proceedings are begun. If they are in the hands of, say, a bank or a solicitor or if they have been spent on the purchase of some identifiable asset, there would be jurisdiction, but if the proceeds have been so dealt with that it is not possible to distinguish them, then there would be no jurisdiction under Section 17, since the court has no power under that Section to order one spouse to pay the other spouse a sum of money in compensation for the loss of property to which that other spouse has successfully proved a title.

Disputes over possession of property

602. Disputes between husband and wife about the possession of property may similarly be referred to the court under Section 17 of the Married Women's Property Act, 1882, and the court can make such order as it thinks fit. The circumstances in which the court has been asked to adjudicate on this question have been concerned mostly with the question of the wife's right to remain in the matrimonial home and to enjoy the use of the furniture. This we deal with in the next section.

THE WIFE'S RIGHT TO REMAIN IN THE MATRIMONIAL HOME

603. In recent years the law has developed in such a way as to give the wife some sort of right to remain in the matrimonial home if her husband has deserted her and left her in occupation; although as yet there has been no authoritative confirmation of the law by decision of the House of Lords. There has been a good deal of speculation as to the nature and extent of this right and judges have from time to time expressed varying opinions on the matter. The present view is that a deserted wife's right to remain in the matrimonial home is a mere equity; her husband's desertion does not confer on her any equitable estate or interest in the land⁴. The right comes into being only at the moment when she is deserted by her husband; she has no right to stay indefinitely in the home, but only a right to stay until such time as the court in its discretion orders her to go out⁵. It is convenient to consider the wife's position under three heads, namely, the protection afforded to her against her husband, against her husband's landlord, and against her husband's successors in title.

The wife's position as against her husband

604. Since a husband cannot sue his wife in tort, he is unable to get her out of the matrimonial home (of which he is the owner or tenant) by suing her in ejectment or trespass, as he could a stranger who was occupying his property. If he wishes to get possession of the home he must apply to the court under Section 17 of the Married Women's Property Act, 1882⁶.

⁴ *Westminster Bank Ltd. v. Lee*, [1955] 3 W.L.R. 376.

⁵ *Woodcock (Jess B.) & Sons Ltd. v. Hobbs*, [1955] 1 W.L.R. 152.

⁶ In *Bramwell v. Bramwell*, ([1942] 1 K.B. 370), Goddard L.J. expressed great doubt whether a husband could bring an action for the recovery of land against his wife, because it would seem that he would then be in effect alleging that she was a trespasser and therefore suing her for a tort. He had, however, a remedy under Section 17 of the Act of 1882. Though the point has never been expressly decided, it may now be regarded as accepted that a husband cannot bring an action for recovery of land against his wife, at least in respect of the matrimonial home.

Under this Section, as we have already said, the court has power to make such order as it thinks fit and in practice it will be slow to order a wife to leave the home where she is living, unless the husband is ready to provide other suitable accommodation. The court's discretion, though it must of course be exercised judicially, is, however, unfettered and there have been cases where a county court judge has made an order for possession against the wife which was not conditional on other accommodation being found, and the Court of Appeal has upheld his decision⁷.

605. The wife's right is not affected by her obtaining a decree of judicial separation⁸. If, however, the marriage is dissolved, this special right terminates and she can remain in the home only if she can establish some kind of contractual right⁹.

The wife's position as against her husband's landlord

606. The case of *Brown v. Draper*¹⁰ established that, if a husband who is the statutory tenant of a house or flat under the Rent Restriction Acts leaves his wife in occupation, she is there as his licensee and he continues through her to retain the statutory tenancy. From later cases, it appears that her position as licensee is a special one in that her husband cannot himself revoke her licence to remain in the home (at least as long as she has not committed adultery). That being so, unless the husband obtains an order of the court under Section 17 of the Act of 1882, he is unable to give up possession of the home, even though he would like to, and the wife is thus protected against the landlord, who cannot turn her out¹¹ so long as she pays the rent and carries out the conditions of the tenancy¹². Moreover, although the wife's adultery might entitle the husband to revoke his authority, the landlord himself cannot rely on this in order to get possession, since in a question between the wife and the landlord her adultery is irrelevant¹³. As, however, the wife is merely a licensee, it has been held that she cannot exercise on her own behalf the rights of the tenant and accordingly cannot, for instance, apply to a rent tribunal for a reduction of the rent¹⁴.

607. It is not altogether clear what would be the position of the wife where the husband, being the contractual tenant of premises to which the Rent Restriction Acts apply, himself terminates the tenancy by giving notice to the landlord. It is possible, however, that in an action for possession brought by the landlord against the wife the court would protect her right to remain in the home¹⁵.

⁷ *Stewart v. Stewart*, [1948] 1 K.B. 507; *Roberts v. Roberts*, [1953] C.P.L. 23.

⁸ *H. v. H.* (1947), 63 T.L.R. 645.

⁹ *Vaughan v. Vaughan*, [1953] 1 Q.B. 762. See also *Robson v. Headland* (1948), 64 T.L.R. 596.

¹⁰ [1944] K.B. 309; in that case the husband was the contractual tenant of the premises when he deserted his wife; the landlord subsequently served notice to quit on him, thereby setting up a statutory tenancy.

¹¹ Subject to Section 3 of, and the 1st Schedule to, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

¹² *Middleton v. Baldock*, [1950] 1 K.B. 657; *Old Gate Estates Limited v. Alexander*, [1950] 1 K.B. 311. The earlier case of *Taylor v. McHale* ([1948] Estates Gazette Digest 299) suggested that the husband was entitled to revoke the wife's licence to live in the house and that if it were clear that he had done so and had removed all his furniture, the landlord could eject the wife as a trespasser. This decision of the Court of Appeal (although it would seem to have been followed in a recent county court case (*Denby v. Atkin*, [1953] C.L.Y. 3145)) appears to be out of line with the doctrine as enunciated by the Court of Appeal in subsequent cases.

¹³ *Wabe v. Taylor*, [1952] 2 All E.R. 420.

¹⁴ *Reg. v. Twickenham Rent Tribunal*, [1953] 2 Q.B. 425.

¹⁵ This might be on the basis, either that the husband's notice to terminate the contractual tenancy was ineffective (because, not being able to revoke his wife's licence, he could not give up possession), or that a statutory tenancy had arisen on termination of the contractual tenancy (because the husband is in fact holding over by retaining possession through his wife after the contractual tenancy has ended).

608. As regards a weekly or other periodic tenancy not protected by the Rent Restriction Acts, it is not clear if the husband could indirectly revoke the wife's licence to remain in the home by giving notice to the landlord, thus putting the wife in the position of a trespasser as against the landlord. But in this case it would seem that in any event the wife would have no protection against the landlord, since he could himself give notice to quit to the husband and then bring proceedings for possession against the wife as a trespasser. On the other hand, where the tenancy is for a term of years and the husband surrenders the remainder of the term to the landlord, it is possible that the wife might be protected in her occupation if the landlord took back the unexpired term with knowledge of the wife's continued occupation.

The wife's position as against her husband's successors in title

609. It has been especially important to determine the exact nature of the wife's right to remain in the matrimonial home when the court has had to enquire into the extent to which she should be given protection against being turned out of the home by a third person who has acquired an interest in it from or through the husband.

610. In *Bendall v. McWhirter*¹⁶ the husband, who was the freehold owner of the matrimonial home, deserted his wife, telling her that she could have the house and furniture. Later, he became bankrupt and his interest in the house passed to his trustee in bankruptcy, who sued the wife for possession in order to sell the house. The Court of Appeal held that the trustee in bankruptcy took the house subject to the wife's right of occupation and could not obtain possession of it without an application to the court (which could be made under Section 105 (1) of the Bankruptcy Act, 1914).

611. Later decisions have established that the wife's right arises only at the moment when her husband deserts her¹⁷. Consequently, if the husband has entered into a mortgage, whether legal or equitable, after his marriage but before his desertion, the mortgagee is not affected by any right of occupation which the wife may acquire, because his right arose before hers and takes precedence.

612. There was for a time considerable doubt whether the wife had any protection against a mortgagee or purchaser who acquired his interest after the date of the desertion. The position would now appear to be as follows. In the first place, the wife may apply to the court under Section 17 of the Act of 1882 for an order restraining her husband from selling or otherwise disposing of the house¹⁸. Secondly, the wife's right is enforceable (subject always to the discretion of the court) against a purchaser taking with knowledge of her occupation¹⁹. Thus the husband cannot seek to defeat his wife's right of occupation by a bogus or conditional sale²⁰. In this connection a purchaser will be held to have had knowledge of her occupation if he failed to make such enquiries and inspection as ought reasonably to have

¹⁶ [1952] 2 Q.B. 466.

¹⁷ *Lloyds Bank Ltd. v. Oliver's Trustee*, [1953] 1 W.L.R. 1460; *Barclays Bank Ltd. v. Bird*, [1954] 2 W.L.R. 319. See also *Woodcock (Jess B.) & Sons Ltd. v. Hobbs*, [1955] 1 W.L.R. 152, at p. 156.

¹⁸ *Lee v. Lee*, [1952] 2 Q.B. 489.

¹⁹ *Street v. Denham*, [1954] 1 All E.R. 532; accepted in *Westminster Bank Ltd. v. Lee*, [1955] 3 W.L.R. 376. A contrary view was taken by the court in *Thompson v. Earchy*, [1951] 2 K.B. 596; in that case it was held that the purchaser of a home which the deserted wife was occupying with the husband's agreement (of which it was alleged, though not admitted, the purchaser was aware) was entitled to possession; this decision has been followed in Australia (*Brennan v. Thomas*, [1953] V.L.R. 111) on the basis that the wife's right of occupation is a mere right against the husband personally.

²⁰ *Ferris v. Weaven*, [1952] 2 All E.R. 233; *Savage v. Hubble*, [1953] C.P.L. 416.

been made by him. This doctrine, however, must be applied to the case of a deserted wife with great caution, since normally it would not be reasonable for an intending purchaser or lender to have to enquire into the relationship of husband and wife²¹. Lastly, since the wife's right is a mere equity, it will not be allowed to prevail against a *bona fide* purchaser for value without knowledge of her occupation²¹.

The position of the wife who has been forced to leave the matrimonial home

613. There has been some speculation whether the wife's right depends on her being in actual occupation of the matrimonial home or whether she can assert it, at least as against her husband, if by his conduct she has been forced to leave the home, on the basis that if he has driven her out, he is in law the deserter. This doctrine was not, however, accepted in a recent case in the county court²². The wife had left the matrimonial home, of which the husband was the tenant, and had then obtained a separation order on the ground of his constructive desertion and persistent cruelty, and also an order for custody of the children. She subsequently applied to the county court under Section 17 of the Act of 1882 for an order that the husband should give up to her the sole possession of the house until other suitable accommodation was provided. The judge refused to make the order on the ground that to make it "would not be a judicial exercise of the discretion for it would be an unwarrantable extension of the principle of the irrevocable licence to a class of wives for which it was never intended, and to which it could not conveniently apply".

The position of the deserted husband

614. The county court has also recently refused to accept the contention that a deserted husband has a right corresponding to that of a deserted wife and has accordingly held that a landlord can turn him out of the matrimonial home of which the wife is the tenant²³.

The use of the furniture in the matrimonial home

615. If the husband has left in the matrimonial home furniture or other articles belonging to him, he has to apply to the court under Section 17 if the wife refuses to give them up. It has been held that when it is a question of the furniture the discretion of the court should not necessarily be exercised in the same way as in dealing with the matrimonial home itself (of the enjoyment of which, as we have said, the court will be slow to deprive the wife). If the return of furniture to the husband will not leave the home bare, the court may order the wife to give it up, even though it may consist of articles of importance which it may take her some time to replace²⁴.

OTHER ISSUES BETWEEN HUSBAND AND WIFE IN RESPECT OF THE MATRIMONIAL HOME

616. The court has also had to consider the situation where the wife desires to prevent her husband from staying on in the matrimonial home or coming back to it.

617. If the home belongs to the wife she is entitled, under Section 12 of the Married Women's Property Act, 1882, to sue her husband in tort for the protection and security of her own property. In this respect, she is in

²¹ *Westminster Bank Ltd. v. Lee*, [1955] 3 W.L.R. 376.

²² *Cook v. Cook* (1954), 104 L.J. 700.

²³ *Seel v. Watts and Butterworth*, [1954] C.L.Y. 2861.

²⁴ *W. v. W.* (1951), 67 T.L.R. 1135.

a more favourable position than her husband, whose only remedy lies, as we have said, in an application under Section 17 of the Act. However, the court has from time to time expressed the view that the wife is not entitled by virtue of the provisions of Section 12 to be protected against her husband's acts as if he were a stranger. In *Shipman v. Shipman*²⁵, Atkin L.J. said:

"She was intended [under the Married Women's Property Act, 1882] to have all the rights and all the remedies that every owner of property was intended to have, including a right to exclusive possession, and the question is whether she has those rights in respect of the matrimonial home against her husband. That is a matter of public importance. It is the duty of husband and wife to live together, and if one or other wilfully absents himself, that is a matrimonial offence, and if a wife, without good cause, seeks to exclude her husband from the matrimonial home, she seeks to get the Court to enable her to evade a duty. Therefore I should be reluctant to lay down a rule that a wife can treat her husband in the same way as a stranger."

In this case, an interim injunction was granted restraining the husband from entering the home pending trial of an action being brought by the wife under Section 12 of the Act of 1882. The conduct of the husband (cruelty and drunkenness) had, however, been such that he could be considered to have lost the right to the matrimonial *consortium* and therefore to be in no better position than a stranger. (There was also evidence that his conduct was reducing the commercial value of the home, which was intended for lodgings.)

618. In a recent case in the county court it would seem that the court went rather further in protecting the wife's position²⁶. The wife claimed possession of a flat of which she was the tenant and for which she had always paid the rent out of her own earnings. The married life had been unhappy, the husband's earnings had been spasmodic (though when in work he had made her a housekeeping allowance) and finally she had told him to leave, but he had refused to go. The judge granted the wife an order for possession, holding that, as the "substantial breadwinner", she was entitled in her own interests, and those of the child, to revoke the husband's licence to stay in the home.

619. A rather special situation is where matrimonial proceedings are pending. In this situation the court has very much in mind the need to prevent unfair pressure being put on the wife to drop the proceedings and an injunction has accordingly been granted to restrain the husband from occupying the matrimonial home, pending the trial of the wife's petition, not only when the home has been the property of the wife²⁷ but also when it has belonged to the husband²⁸. In the case of *Richman v. Richman*²⁹, however, where the wife had already left the matrimonial home, of which she was the joint owner, the court refused her request that her husband be turned out of the home to enable her to go back to it pending the trial of her divorce petition, holding that the property rights of husband and wife were equal and that any hardship she might suffer could be compensated by money.

²⁵ [1924] 2 Ch. 140, at p. 145. See also *Symonds v. Hallett* (1883), 24 Ch.D. 346.

²⁶ *Copeman v. Copeman* (1953), 103 L.J. 624.

²⁷ *Boyt v. Boyt*, [1948] 2 All E.R. 436; *Teakle v. Teakle* (1950), 66 T.L.R. 2, 588.

²⁸ *Silverstone v. Silverstone*, [1953] 1 All E.R. 556.

²⁹ [1950] W.N. 233.

THE PRESENT LAW: SCOTLAND

Position during marriage

620. The wife's position under the common law in Scotland during marriage was much the same as in England. By virtue of his *jus mariti* the whole moveable estate belonging to the wife at marriage and acquired after marriage (including her earnings) became the husband's absolute property. The *jus mariti* could, however, be excluded; for instance, the husband could renounce it before marriage and property could be given to the wife by third parties free of it. The husband also had a "right of administration" by virtue of which he became administrator of the wife's heritable estate (which the law allowed her to hold in her own name though the income from it belonged to the husband) as well as of moveable property from which the *jus mariti* had been excluded. If both the husband's right of administration and his *jus mariti* were excluded, then the wife could deal with her property as if she were unmarried.

621. A limited improvement in the wife's position was brought about by the Conjugal Rights (Scotland) Amendment Act, 1861, and the Married Women's Property (Scotland) Act, 1877. Then the Married Women's Property (Scotland) Act, 1881, abolished the husband's *jus mariti* and partially excluded his right of administration. Finally, by the Married Women's Property (Scotland) Act, 1920, this latter right was abolished and a married woman's disabilities were wholly removed by giving her the same powers of disposal over her property as if she were unmarried. The position as to the property rights between husband and wife during marriage is therefore now substantially the same in Scotland as in England, that is, there is a system of separate property.

622. The Scottish Act of 1920 contains no provision corresponding to Section 12 of the English Act of 1882, which expressly prohibits (apart from one exception) actions in tort (delict in Scotland) between husband and wife. The common law rule is that husband and wife cannot sue each other in civil actions based on delict or *quasi-delict*, since this would be contrary to public policy. The Scottish courts have held that this rule has not been abrogated by the Act of 1920³⁰, though Section 3 (1) has been judicially interpreted as modifying it to the extent of permitting actions between husband and wife based on contract³¹. It would appear, however, that either spouse may sue the other for the return of personal property or for the value of such property³².

623. The Scottish Act of 1920 also contains no section corresponding to Section 17 of the English Act of 1882 (see paragraph 600). In Scotland, disputes between husband and wife over title to or possession of property are dealt with in ordinary actions of law, and on the same footing as if husband and wife were strangers. Thus, it is now well settled that the spouse who is the owner or tenant of the matrimonial home is entitled to obtain an order for the removal of the other spouse from the home³³, on the basis that in determining the right to occupy property, "the question is to be dealt with when it arises between husband and wife in exactly the same way as when it arises between strangers". In other words, the Scottish courts, unlike the English courts (see paragraph 617), have taken the view that where proprietary rights arise the matrimonial relations and obligations of the parties are irrelevant—these are to be dealt with in other proceedings.

³⁰ *Harper v. Harper*, 1929 S.C. 220.

³¹ *Horsburgh v. Horsburgh* (O.H.), 1949 S.C. 227.

³² *Aitken v. Aitken*, 1954 S.L.T. (Sh. Ct.) 60.

³³ *Maclure v. Maclure*, 1911 S.C. 200; *Millar v. Millar*, 1940 S.C. 56.

Position on divorce

624. On divorce the results in Scotland are quite different from those in England. We have dealt with this matter in paragraphs 540–541. Here it is sufficient to say that in Scotland the innocent wife acquires rights in her husband's property, both moveable and heritable, and the innocent husband acquires rights in his wife's heritable property, though not in her moveable property. If each spouse is divorced from the other in cross-actions of divorce neither spouse acquires any rights by the divorce in the property of the other.

EVIDENCE AND PROPOSALS SUBMITTED TO THE COMMISSION

TENOR OF THE EVIDENCE

625. We were required by our terms of reference to consider whether any changes should be made in the law relating to the property rights of husband and wife, both during marriage and after its termination (except by death). Evidence bearing on the property rights of husband and wife was submitted by a very large number of English witnesses, representative of a wide range of interests and activities. In addition, we ourselves sought the views of certain bodies on some specific suggestions which had been put to us³⁴. The vast majority of the English witnesses who expressed views on this aspect of our terms of reference considered that in certain respects the present law is unfair to the wife. The volume of evidence from Scotland was very much smaller and, in the main, much less critical of the present position (apart from the matter of legal rights on divorce, which has been dealt with in Part VII).

626. In both the English and Scottish evidence there were two distinct lines of criticism. Firstly, there were witnesses who were primarily concerned about the status of the wife in the marriage partnership. These witnesses argued that, if the wife is not herself a wage-earner (or with private means), her position is one of "economic servitude"; the law fails to take any account of the value of the work which she does in looking after the home and the children; on the contrary, the law still regards her as her husband's dependant, that is to say, as a person of inferior legal and economic status; and while it may be true that most husbands do not abuse their legal rights, it is wrong in principle that the wife should be left to rely on her husband's goodwill for her well-being. The aim of these witnesses was therefore to secure that the law should effectively recognise that the wife's contribution to the marriage partnership, by her services in the home, is equal to that of the husband as breadwinner.

627. As specific instances of injustice to the wife, the following were cited:

- (i) She has no way of ensuring that she gets a sufficient allowance on which to run the home. If her husband does not choose to tell her, she cannot even find out what he earns.
- (ii) She has no legal right to any allowance for her own personal spending.
- (iii) Any money she manages to save from the housekeeping allowance is in law her husband's.

³⁴ This supplementary evidence has been published in Part II of the Appendix to the Minutes of Evidence.

(iv) She can lay no claim to a share in the home and the furniture except to the extent that she can prove that she has contributed out of her own separate income.

(v) The profits of her husband's business are his own, although she may work with him in it without taking any wages.

628. It was said, too, that the wife's economic dependence on her husband was not only doing her grave injustice, it was also "one of the basic and most insidious factors contributing to the stresses and strains of married life"; if the status of married women were raised, the quality of present marriages would be improved and, moreover, the influence on the children would be a powerful factor making for stability of marriage in the next generation.

629. Secondly, there were witnesses who were chiefly concerned over the hardship which a wife may suffer on the breakdown of the marriage, if, as usually happens, the matrimonial home and the furniture belong to the husband. It was said that a wife often puts up with her husband's gross ill-treatment because she fears that she will lose her home. If she does obtain a separation order on the ground of her husband's cruelty or adultery, she may be forced to return to him because, as conditions are today, she can find nowhere else to live; if she can find a roof for her head, she has then no furniture if he refuses to give her any. If the husband has gone away leaving the wife in the home, he may come back at any time and she cannot keep him out, however badly he has treated her in the past. He may even return to the home bringing another woman with him.

PROPOSALS

630. It would be impracticable to deal in detail with the wide variety of proposals put forward to remedy the alleged defects in the present law, but they may be divided into four broad categories, thus:

- (1) Proposals based on the introduction of community of property between husband and wife.
- (2) Proposals to give the wife a legal right to an allowance for her own personal spending.
- (3) Proposals to give the court a discretionary power to deal with the occupation of the matrimonial home and the division of its contents after a separation or maintenance order has been made by a magistrates' court.
- (4) Proposals to give the court a discretionary power to deal with the occupation of the matrimonial home and the division of its contents after a divorce has been obtained.

We deal with each of these types of proposal in turn.

Community of property

631. Some witnesses suggested that we should enquire into the operation of the systems of community of property which apply in other countries³⁵. These systems vary considerably. Under a system based on full community, all property, whether belonging to the husband or the wife before marriage, or acquired after marriage, becomes the joint matrimonial property; in addition, the profits (including wages and earnings) made by either spouse during the marriage fall into the community and the losses incurred by either are shared by both. Under other systems, the community is limited to certain types of property. There is as a rule provision whereby husband and

³⁵ In Appendix III we describe briefly some of these systems.

wife may expressly contract out of the system of community of property at the time of marriage and whereby certain kinds of property may be excluded from the community. On divorce, the community of property is dissolved ; it is not, however, an invariable rule for each spouse to receive a half-share of the property held in community ; in a number of countries there is provision for the court to take into account the conduct of the parties and their respective contributions, in sharing out the estate. It is important to note that usually the husband, by virtue of his marital power, is the administrator of the property in the community (as well as of any separate property the wife may own). It is he alone who has full legal capacity and the position of the wife is similar to that of a minor. Consequently, he can deal with the property held in community as he thinks fit, and without reference to the wife, so long as he does not squander it or seek to defraud her ; if he does, she may apply to the court to protect her interests. The Scandinavian countries have, however, departed from the traditional concept of the husband as administrator. Under the system in these countries, each spouse continues to have control over the property which he or she has contributed to the community at the time of marriage or which he or she subsequently contributes, except that the written consent of the other spouse is required before the matrimonial home and the furniture, or property upon which the husband and wife depend for their living, can be sold or mortgaged.

632. We have set out very briefly the essential features of the systems of community of property in force today, as background to the proposals put to us by some of our witnesses. Only a few put forward comprehensive schemes of community of property ; although some others considered that the possibility of introducing the principle of community of property was worthy of serious consideration.

633. Those who submitted specific proposals to us contemplated that, with the exception of the matrimonial home and its contents, all property owned by husband or wife before marriage should continue to be their separate property after marriage. As we have explained, the witnesses' aim is that the division of labour between husband and wife should be effectively recognised, and thus attention is focussed on property acquired during the marriage. The proposals naturally vary in their detail, but, generally speaking, they provide that all property acquired after marriage, excluding gifts from third parties but including income, profits and rents whether from property acquired before or after marriage, should be the joint property³⁶ of husband and wife. Provision is made for husband and wife to have the right, at the time of marriage, to contract out of community of property. On divorce, the court is given some measure of discretion to make such order in respect of the property as it thinks fit, with particular regard to the interests of the children.

634. Other witnesses supported a more limited introduction of the principle of community of property, namely joint ownership³⁶ of the matrimonial home and its contents (or, sometimes, of the contents only). Support was also given to the view that savings made from an allowance for house-keeping purposes (and any investments or purchases made from such savings) should, unless husband and wife have agreed otherwise, be deemed to be joint property.

³⁶ In using the terms " joint property " and " joint ownership " we understood the witnesses to mean what in England is called " tenancy in common " and in Scotland " common property ".

The wife's allowance

635. Those who supported proposals for providing the wife with an allowance considered that the proper way to recognise the wife's work in the home is to give her a legal right to a part of her husband's income to spend just as she pleases, and to be regarded as her salary for running the home. It was said that the selfish husband spends too much on himself; that his wife may be obliged to plead with him for trivial sums of money for her own needs; and that lack of personal spending money may force her out to work when it would be better that she should stay at home to look after the children. Two ways of making legal provision for a personal allowance for the wife were suggested:

- (a) she should be entitled by statute to a specific proportion of her husband's gross earnings—say, a minimum of 10 per cent.;
- (b) the law should establish her right to a personal allowance but it should be left to the court to determine what the sum should be, if the husband fails to meet his statutory obligation.

Provision to deal with the matrimonial home and its contents after an order has been made in a magistrates' court

636. A substantial number of witnesses considered that the major problem today is the hardship described in paragraph 629, and that to meet this problem it is necessary to give the court some measure of power to deal with the occupation of the matrimonial home and the use of the furniture, so that it can ensure that a wife who has been ill-treated by her husband will have a roof over her head and a sufficiency of furniture. Various suggestions were made, but the proposal which received most support was that a magistrates' court should have power, on making a separation order, to determine at the same time which spouse should live in the matrimonial home and to make a fair division of the furniture between the spouses or, alternatively, to allow the spouse who is to occupy the home the use of the essential furniture. If the matrimonial home were held under a tenancy, it was usually contemplated that the court should be able to order a transfer of the tenancy from one spouse to the other. Some witnesses were prepared to go further and to give the court power to deal with the matrimonial home and the furniture on making a maintenance order, as well as a separation order; others wished to limit the proposal, in whatever form it might be adopted, to cases where there were children for whom a home should be provided. Not all witnesses insisted on the jurisdiction being given to the magistrates' court; some in fact thought that the county court would be a more suitable tribunal for dealing with questions of tenancy.

637. It is probable that when these proposals were submitted the witnesses were not all aware of the extent of the wife's protection under the existing English law, because it was not until the case of *Bendall v. McWhirter*, in 1952, that the implications of the earlier decisions of the courts were fully appreciated. Since then, the nature and extent of the deserted wife's right to remain in the matrimonial home have been further clarified and developed. But nevertheless the law does not provide for the type of case about which many of our witnesses were particularly concerned, namely, the case where the husband behaves badly to his wife but does *not* leave the matrimonial home.

Provision to deal with the matrimonial home and its contents after divorce

638. For the most part, witnesses who suggested that provision should be made to allow the court to deal with the matrimonial home and its contents after an order had been made by a magistrates' court considered that similar provision should be available after divorce. In addition, some witnesses made proposals confined to the case of divorce (and judicial separation).

Previous attempts in England to give the court power to deal with the matrimonial home and its contents

639. It is convenient at this stage to refer to certain unsuccessful attempts, in England, to give the court power, on making an order in matrimonial proceedings, to deal with the tenancy of the home and the division of its contents.

640. During the passage of the Summary Jurisdiction (Separation and Maintenance) Bill, 1925, an amendment to give a magistrates' court power, on making an order, to apportion the furniture in the home between husband and wife was rejected by the House of Commons, on the ground that it would introduce a novel principle in law, which would be difficult to administer.

641. The Deserted Wives Bill, 1951, proposed to give the court power to transfer to the wife the tenancy of the home (if this were a tenancy to which the Rent Restriction Acts applied), as well as to hand over to her the furniture, but the jurisdiction was to be limited to a wife who had obtained an order on the ground of her husband's desertion and was living in the home when the order was made. Power to deal with the furniture was to be further limited to cases where there was a child of the marriage. The principal criticisms were:

- (i) The Bill singled out the matrimonial offence of actual desertion ; it ignored constructive desertion and made no provision for the hardship which a wife might suffer who had an adulterous or a cruel husband.
- (ii) The deserted wife had already secured protection under the existing law in her occupation of the matrimonial home. To this extent, therefore, the Bill was unnecessary and, indeed, undesirable in that it would introduce uncertainty in the law, for instance regarding the position of the deserted wife who had not obtained a court order.
- (iii) It was unfair to the landlord to force upon him as a tenant someone whom he might be unwilling to have.
- (iv) It was unjust to the husband to allow a court to take away from him his own property. In matrimonial cases, the issue of guilt and innocence was rarely clear-cut ; it might well have been the wife's fault that her husband had left her.
- (v) In matrimonial cases, a magistrates' court was often dealing with a temporary situation. The wife might be given a maintenance order within a week or so of her husband leaving her ; he might return in another week or two and they would be reconciled. If, however, she had been able to get an order giving her the tenancy and the furniture this would seriously impair the prospects of reconciliation.
- (vi) It would be wrong to give a magistrates' court jurisdiction to deal with property matters ; these involved difficult questions of law and might take lengthy investigation. For such issues a magistrates' court was not a suitable tribunal and it would, indeed, be unfair to impose this burden of work on it.

642. The proposal on the matrimonial home in the two Women's Disabilities Bills (1952 and 1953) was much wider in its scope, in that :

- (a) Power to deal with the tenancy and the furniture was to be given to the magistrates' court on making a separation or maintenance order on any of the statutory grounds and to the High Court on granting a decree of divorce, judicial separation or restitution of conjugal rights.
- (b) The power was not limited to cases where the wife was living in the home at the time of the decree or order.

Provisions were included designed to safeguard the landlord's interests, but they did not satisfy those who considered that it was in principle wrong to give the court power to compel a landlord to take a wife as tenant in place of her husband. For the rest, the Bills were criticised on much the same lines as the Deserted Wives Bill.

THE COMMISSION'S VIEWS ON THE WITNESSES' PROPOSALS

General considerations

643. We set out first some general observations, as a background to our examination of the proposals submitted to us.

644. In the first place, we fully endorse the view that marriage should be regarded as a partnership in which husband and wife work together as equals, and that the wife's contribution to the joint undertaking, in running the home and looking after the children, is just as valuable as that of the husband in providing the home and supporting the family.

645. We think that the importance of the wife's contribution is not always sufficiently recognised. There are husbands who look on their income as their own to spend freely on themselves and grudgingly dole out small sums to their wives. But it is when the marriage breaks down that the wife who has given all her energy to her work in the home may have to face the situation that she has nothing she can call her own ; even money she has saved over the years from the housekeeping allowance belongs in law to her husband. We recognise that real hardship may occur in this type of case.

646. There is, of course, another side to the picture. There are many husbands who hand over their pay packets each week to their wives and then it is sometimes the wife who grudges her husband "beer and tobacco" money. It must also be remembered that many wives now continue in paid work after marriage. The wife will then usually be able to buy some furniture and perhaps contribute to the purchase of the home ; or she may save money in her own name. This is, of course, desirable in that it gives the wife something of her own. We have, however, been told that the wife who goes out to work may be apt to regard her earnings as something apart and of no concern to her husband, and to reserve to herself the right to spend them as she thinks fit. She may use her husband's allowance to run the home and her own earnings to buy the furniture. If the marriage breaks down, she then claims the contents of the home as entirely her own property ; yet she should realise that, without her husband's house-keeping allowance, she could not have bought everything herself. In such cases it may be said that it is the wife who has failed to recognise that marriage is a partnership.

647. Nevertheless, after making full allowance for the fact that many husbands are generous and that not all wives are ready to play their part, we think that the weight of evidence suggests that some amendment of the law is desirable in order to give more effective recognition to the wife's contribution to the marriage. In considering what might be done, we have, however, thought it essential to keep in mind, first, the practical limitations of any attempt to legislate in a matter of social policy, and secondly, the vital consideration that so far as possible the law should be kept out of the intimate life of the family.

648. There is a further consideration which we have kept in mind. As we have said, wives may be selfish and grasping as well as husbands; it is necessary to guard against the risk that substantial injustice may be done to husbands as a result of measures designed to alleviate the hardship which some wives may suffer.

649. It is against this background that we have examined the different types of proposal which were put to us, and with which we now deal.

Community of property

650. We were unable to reach agreement on whether it would be desirable to introduce into English and Scots law community of property between husband and wife. Twelve of us³⁷, for the reasons set out below, consider that it would be undesirable to introduce community of property, even as a limited measure confined to the matrimonial home or to the furniture. Seven of us³⁸ consider that the concept has much to commend it, as an effective and practical expression of partnership in marriage, but differ as to the extent to which it would be right to introduce community of property. Of the seven, three³⁹ would confine it to the matrimonial home and the furniture, and one⁴⁰ to the furniture alone.

Views of those twelve³⁷ members who are opposed to the introduction of community of property

651. (i) The introduction of community of property in England would mean a striking departure from the traditional law. While it may be said that in the 12th and early 13th centuries English law had not made up its mind about the position of the married woman, in the course of the 13th century the law developed on lines which resulted in the decisive rejection of the idea of a community of goods between husband and wife⁴¹. Although there may be some basis for saying that the theory of community of property would be less alien to Scots law⁴², as a practical measure

³⁷ Lord Morton of Henryton, Sir Russell Brain, Mr. Brown, Sir Frederick Burrows, Mr. Flecker, Mr. Lawrence, Mr. Mace, Mr. Maddocks, Mr. Justice Pearce, Lady Portal, Lord Walker, Mr. Young.

³⁸ Mrs. Allen, Dr. Baird, Mr. Beloe, Mrs. Brace, Lady Bragg, Mrs. Jones-Roberts, Lord Keith of Avonholm.

³⁹ Mrs. Allen, Mrs. Brace, Lady Bragg.

⁴⁰ Mr. Beloe.

⁴¹ See *A History of English Law* by W. S. Holdsworth (pp. 521–525, Vol. III, Third Edition, 1923) and *The History of English Law before the time of Edward I* by Pollock and Maitland (pp. 399–436, Vol. II, Second Edition, 1898).

⁴² At one time it was thought that a communion of all the moveable property belonging to husband and wife (a *communio bonorum*) was created by virtue of the marriage. Lord Fraser, however, argued that this was an artificial concept—a mere legal fiction—which could not be reconciled with the husband's *jus mariti*, that it had been borrowed at a comparatively late date from the French, and that the old Scots law recognised no such doctrine as a *communio bonorum*. In any event, whatever may have been the true view, the limitation (and subsequent abolition) of the husband's *jus mariti* and right of administration was accompanied by the introduction of a system of separate property and not of community of property. (See *Fraser on Husband and Wife*, Second Edition, Chapter IX (Vol. 1, 1876).)

Views of twelve members (*continued*)

it would be just as substantial an innovation in Scotland as in England. We do not suggest that community of property should be rejected on this ground alone, but it is none the less a consideration which cannot be ignored, for the handicap of unfamiliarity must prejudice any measure.

(ii) We have, however, rejected community of property primarily because we think that the existing system of separate property is much better. In our opinion, community of property has three substantial defects. First, it takes no account of what we hold to be a natural and normal desire in people to acquire property of their own. We think that in England and Scotland there is no general desire for community of property, and if it were introduced many people would be put to the trouble of taking steps to exclude it. It is better to make separate property the rule; husband and wife are always free to own property together if they so wish.

(iii) Secondly, we are satisfied, from our examination of the systems of community of property in other countries, that a system of community of property would be extremely complicated and much more difficult to operate than a system of separate property, if it is to conform to the view of the wife's status which is accepted today. We must stress this last point, because it rules out the obvious way of simplifying the operation of community of property, namely, by making the husband the administrator of the common property (as he is, for instance, under the French law). If husband and wife are to be on the same footing, many difficulties arise. To take one instance, there would be the problem of how to ensure, if one of the spouses is running a business, that the other spouse cannot wreck it by refusing to allow profits to be ploughed back or by insisting on taking a share in the management. We doubt in fact whether it would be possible to devise a system of community of property which would be practicable and at the same time acceptable to the people of England and Scotland.

(iv) Thirdly, we think that the sum total of injustice under community of property would be far greater than under separate property. Ideally, husband and wife should work together for the common good; but in practice this does not always happen. It would often be most unfair that one spouse should be able to claim a half-share of property which the other spouse has acquired; we cite, as an example, the case of a wife who has a lazy and improvident husband and who by her own hard work and thrift has managed to buy a house.

(v) We have set out our objections to a comprehensive system of community of property. In our opinion, community of property in the matrimonial home and its contents would be equally undesirable; there would be the same practical difficulties and it would often be unfair to one or other spouse. There is only one instance where we think that it would be practicable and equitable to apply the principle of community of property, namely to savings from a housekeeping allowance (see paragraphs 699-701).

Views of those seven members who support the introduction of some form of community of property

652. Seven of us⁴³ are agreed that it is desirable to introduce a measure of community of property in order to go some way towards giving the wife the security and the stake in the property of the marriage to which she is rightly entitled. A married woman may spend years of her life

⁴³ Mrs. Allen, Dr. Baird, Mr. Beloe, Mrs. Brace, Lady Bragg, Mrs. Jones-Roberts, Lord Keith of Avonholm.

Views of seven members (*continued*)

looking after and improving the home. Yet often the house and its furniture are the sole property of the husband and he may dispose of them without her consent or he may leave them by will to someone else. The woman may have been earning an independent livelihood before marriage and had she remained single could have set up her own home. If, on marriage, she gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own. Three of us⁴⁴ therefore consider that community of property should be introduced for the matrimonial home and its contents; three of us⁴⁵, while supporting this as a limited measure, advocate the introduction of community of property as a general principle (see paragraph 653); while one of us⁴⁶ thinks that community of property should be confined to the contents of the matrimonial home.

Views of those three members who support the introduction of community of property as a general principle

653. (i) In our opinion, it is in keeping with the view of marriage as a life-long partnership that the property of husband and wife should be held in community. Indeed, it may be said that the present system of separate property is inconsistent with that view of marriage. We are not impressed by the argument that community of property might sometimes be unfair to one or other spouse. Any rule works hardly in some cases, but the principle of community of property, suitably applied, would introduce a much greater measure of fairness into married life, in that it would ensure that husband and wife shared equally in the profits and losses of the partnership. As a practical matter, community of property would not as a rule assume importance so long as the marriage was happy, but it is precisely when things go wrong that it is desirable to secure the protection of the law.

(ii) We think that the difficulties in the operation of community of property have been exaggerated. A system broadly on the lines we envisage is in force in the Scandinavian countries. We have reason to believe that it works well there and we think that with such modifications as might be necessary it could be made to operate satisfactorily in this country. Husband and wife should be able to contract out of community of property; it should also be possible to exclude certain assets or items of property from the community, as in the case, for instance, of one of the spouses running a business alone or in partnership with others. The community should be administered by husband and wife acting together. On divorce the court should have power to deal with the occupation of the matrimonial home and the division of the furniture, on the lines which the Commission is recommending in paragraph 697.

The wife's allowance

654. We are satisfied that it would be quite impracticable to give the wife a legal right to a definite part of her husband's income. There is no way of establishing what proportion would be reasonable, and fair to both husband and wife, since the factors which must be reckoned with are infinitely variable. Some husbands have heavier commitments than others. Earnings may vary from week to week or even from day to day. A wife

⁴⁴ Mrs. Allen, Mrs. Brace, Lady Bragg.

⁴⁵ Dr. Baird, Mrs. Jones-Roberts, Lord Keith of Avonholm.

⁴⁶ Mr. Beloe.

may have a private income or herself be earning more than her husband. The practical objections to this proposal are clearly brought out in the evidence given by one of the women's organisations; this body had at first supported the proposal but subsequently withdrew its support, on the ground that the difficulties of implementation were insuperable⁴⁷.

655. We must also reject the alternative suggestion, namely, that it should be left to the court to fix an allowance for the wife. This is not the sort of question on which a court should be asked to adjudicate. We have said (in paragraph 1044) that it would be in principle wrong to ask the court to fix a housekeeping allowance, since that would be in effect to ask it to fix the standard of living of the family. But if the court had to determine what a wife should have for her personal spending, it would be necessary for it to go into the details of the family income and it would, in effect, have to decide how that money should be laid out.

Proposals giving the court power to deal with the matrimonial home and its contents

656. We are unable to accept the proposal that a magistrates' court in England should have power, on making a separation or maintenance order, to deal at the same time with the occupation of the matrimonial home and the division of its contents. We recognise that this would be the only certain means of alleviating two cases of real hardship: first, that of the wife who, having obtained a separation order on the ground of her husband's cruelty or adultery, is none the less forced to go back to him because she can find nowhere else to live; and secondly, that of the wife who has been driven out of the home by her husband's ill-treatment. But, as we shall explain, we are satisfied that the objections to the proposal far outweigh the benefits it would secure for a comparatively small number of wives.

657. In the first place, we do not think that a magistrates' court should be expected to deal with the difficult and complex questions which would arise in adjudicating on matters involving the property rights of husband and wife. The summary procedure in magistrates' courts is their great advantage; but in such matters it would be a serious disadvantage. If this were our only objection to the proposal, it could be met by giving the jurisdiction to the county court or the High Court; the wife would perhaps not be so effectively protected if the occupation of the matrimonial home could not be dealt with at the time a separation or maintenance order was made by the magistrates' court, but she would still be afforded a fair measure of security. Our real difficulty is that we cannot accept the principle underlying the proposal.

658. It is necessary to make plain just what this proposal is designed to do: it is to allow the court to deprive a man of the use of his own property for an indefinite time, to allow it to order him to leave a house which belongs to him and contains his furniture, so that his wife can have exclusive possession. It is clear that this is a very far-reaching inroad on the rights of ownership. We are not suggesting that in no circumstances could it be reasonable; indeed, we are recommending later that the High Court should be able to do this on the granting of a decree of divorce (or nullity of marriage or judicial separation). But that is a quite different matter from allowing it to be done on the making of a separation or maintenance order in a magistrates' court. Such orders are designed to provide an immediate remedy for a situation which it is hoped will often not be

⁴⁷ See QQ. 8173 and 8296, Minutes of Evidence, Thirty-fourth Day (National Federation of Business and Professional Women's Clubs).

permanent, and it is wrong in principle that they should be followed by a more or less permanent disposition of the matrimonial home and the furniture. In our opinion, if, after the wife had obtained a separation or maintenance order, the court could order that she should have sole possession of the home, if necessary transferring the tenancy to her, and at the same time giving her most if not all the furniture, there would inevitably be many cases where the remedy would be abused and serious injustice would be done to the husband; there would also be many cases where what would otherwise have been a merely temporary estrangement between husband and wife would result in a final rupture of the marriage.

659. As we have said, the advantage of a magistrates' court is that it can act quickly. A wife may get a maintenance order on the ground of her husband's desertion, actual or constructive, within a week or so of his leaving her or of her leaving him. Such orders may, however, last only a short time; the husband goes back or she returns to him on his promise to behave better to her in the future. And often the reconciliation is lasting. Separation orders, too, are not necessarily permanent. It must also be remembered that sometimes it is the wife's own fault that her husband has behaved badly to her, and that there are wives who would be well pleased to be rid of their husbands and have the home to themselves. It would put a powerful weapon in their hands if they could come to the court and get their husbands ejected.

660. There is a further consideration which should not be ignored—the position of the landlord if the home is rented. If the husband is to be turned out of the home, we agree that it would be necessary that the court should be able to substitute the wife as tenant. We should be reluctant to contemplate the possibility of a wide use of such a power, because of its interference with the landlord's rights (although we do not object to a limited power being given to the High Court or county court—see paragraphs 689–690). We realise that for the most part the tenancies would come within the scope of the Rent Restriction Acts and that it may therefore be argued that the landlord's freedom is already severely limited by statute. But it may also be said that that is all the more reason why there should be as little further encroachment as possible on his rights. It must be recognised that by and large the landlord would be forced to take a less substantial, and therefore from his point of view less desirable, tenant.

661. We have explained why we cannot support any proposal which would give the court an unfettered discretion to deal with the matrimonial home and its contents after a wife had obtained a separation or maintenance order in a magistrates' court in England. In the paragraphs which follow we set out the extent to which we think it would be desirable and practicable to recognise that, although the matrimonial home and the furniture may belong to the husband, yet, in fairness to the wife, they should not be regarded as his to deal with just as he likes in all circumstances.

THE COMMISSION'S PROPOSALS

THE MATRIMONIAL HOME AND ITS CONTENTS

662. Our recommendations in respect of the matrimonial home and its contents fall under two heads:

- (i) Provision for protecting a spouse who has been left by the other spouse in occupation of the matrimonial home.
- (ii) Provision for dealing with the occupation of the matrimonial home and the division of the contents after a decree of divorce, nullity or judicial separation.

Provision for protecting a spouse who has been left in occupation of the matrimonial home

663. We deal first with England, and with the position of the wife. As we have said in paragraph 603, in recent years the English law has developed in such a way as to give a deserted wife a very considerable measure of protection in her occupation of the home. Her husband cannot turn her out without an order of the court under Section 17 of the Married Women's Property Act, 1882; if she has nowhere else to go, the court will not readily order her to leave. If there is a statutory tenancy, the landlord in effect cannot turn her out so long as she pays the rent and carries out the conditions of the tenancy. She is not in all circumstances protected against being turned out by a purchaser of the house from the husband, but she is certainly secure against any arrangement between the husband and the purchaser designed to defeat her right to remain.

664. We think that it has been right to afford this protection to a deserted wife, to allow her to keep a roof over her head; it would be shocking to contemplate that a husband could put his wife and children into the street so that he could himself return to live in the home, perhaps with another woman. The law has, however, been criticised on the ground that it leaves to some extent uncertain the position both of a wife and of third parties. Moreover, the law is not firmly settled since it does not as yet rest upon a decision of the House of Lords. For these reasons, we consider that it would be preferable to lay down in a statute the circumstances in which a wife should have a right to remain in the matrimonial home.

665. To give the deserted wife complete protection it would be necessary to give her a right, as against all the world, to stay on in the matrimonial home until ordered to leave by the court. The decisive objection to that course, in our opinion, is the unsatisfactory and insecure position in which it would place third parties. It would be necessary, for instance, for a would-be purchaser of a house, or for an intending mortgagee, to make full enquiries into the matrimonial circumstances of the owner before the transaction could be safely completed. On the other hand, to give the wife a right merely against her husband personally would be equally unsatisfactory in as much as she would then have no protection against her husband's disposing of his interest in the home to third parties.

666. We have adopted a middle course. Our proposals are designed to afford to the wife the greatest possible measure of protection consonant with ensuring that there is no unreasonable interference with the rights of third parties.

667. If the husband is the owner or tenant of the matrimonial home⁴⁸ and he has gone away leaving his wife in occupation, we consider that he should not be able to turn her out unless and until he obtains an order of the court for possession.

668. On the husband's application to obtain possession the court should have an unfettered discretion to make such order as it thinks fit, after taking into account such matters as the circumstances of the husband's leaving, the conduct of husband and wife, respectively, and their respective means.

669. The wife's right to remain in the matrimonial home until ordered to leave by the court should arise from the fact that she has been left in it by her husband and should be a right against him personally. It should not at that stage affect the rights of any third party (such as a trustee in

⁴⁸ We contemplate that our proposals should also apply, in so far as they are appropriate, to instances where husband and wife both have an interest in the matrimonial home.

bankruptcy, a mortgagee or a purchaser), who has acquired an interest in the property, even if this interest was acquired after the husband left the home. In this respect we depart from the existing law under which in certain circumstances the rights of a third party are subject to the wife's right of occupation (see paragraphs 610 and 612).

670. Some additional protection is, however, required for the wife, to prevent the husband from selling the home over her head or transferring it to some other person or, if he is the tenant, giving up the tenancy to spite her. We therefore propose that where a wife has been left in the home by her husband, she should have a right to apply to the court for an order restraining her husband, for such period as the court thinks fit or until further order, from selling or mortgaging the home or in any other way disposing of an interest in it, or from surrendering the tenancy, whether contractual or statutory. We contemplate that an order should not be made without an enquiry by the court whether the circumstances justify it.

671. An order restraining the husband from disposing of the home or surrendering the tenancy should be capable of registration under the Land Charges Act, 1925. When registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the wife's right of occupation. In the case of a tenancy, a copy of the order should also be served on the landlord or his agent and a surrender of the tenancy in breach of the order should be null and void.

672. We appreciate that it would be possible for the husband, on receiving notice of the wife's application, to attempt to dispose of his interest in the home or to give up the tenancy before the hearing of the application. It would, however, be open to the wife to apply for an interim injunction when she starts the proceedings.

673. The husband may be willing to allow his wife to stay on in the home without her having recourse to the legal machinery proposed in paragraph 670. In such a case we suggest that it should be possible for a written undertaking by the husband not to dispose of any interest in the home or to give up the tenancy to be registered and, if appropriate, to be served on the landlord or his agent. After registration, third parties should take an interest subject to the wife's right of occupation; and after service, the landlord should be bound not to accept a surrender of the tenancy.

674. We consider that a wife left in occupation of the matrimonial home should also have a right to the use of such furniture and equipment belonging to her husband as is essential for the running of the home. The husband should not be entitled to remove such articles without his wife's consent unless he obtains an order of the court. Further, the wife should be able to apply to the court for an order restraining the husband from selling, pledging or giving them away.

675. We contemplate that the county court and the High Court should have jurisdiction to deal with applications under our proposals (as they have at present to deal with applications under Section 17 of the Married Women's Property Act, 1882).

Provision where there is a mortgage on the home

676. Under the present law the protection afforded to the wife in her occupation of the matrimonial home may be defeated if there is a mortgage on the house, for instance if the husband is purchasing it by means of a loan from a building society, since third parties who have acquired an interest in the home before the wife was left in it are not affected by her right of

occupation. After leaving his wife, the husband may stop making the payments due on the loan, and the building society will then be able to take over the house. The society may, of course, be willing to accept an offer from the wife to keep up the payments, but otherwise she will lose her home. Our proposals, as they stand, do not of course change the position.

677. In order to protect the wife if the husband stops repayment of a loan on the matrimonial home, we propose that the building society or other mortgagee should be bound to accept payment of the instalments if the wife tenders them and is prepared to observe the conditions of the original agreement. The husband, if he can be traced, should be given adequate notice by the building society or other mortgagee that it proposes to accept payment by the wife unless, within a specified period, he pays the arrears and makes it clear that he intends to keep up the payments. The obligation on the mortgagee to accept payments tendered should not be affected by a decree of divorce or of nullity of marriage obtained at the instance of either the husband or the wife, but it could be affected by an order of the court dealing with the disposition of the matrimonial home (see paragraphs 679 and 697 (i)).

678. Provision must also be made to deal with the situation when the payments have come to an end. In England, a mortgagor remains the legal owner of the freehold, so that usually the house will have been conveyed to the husband when he took out the mortgage with (say) a building society. If the society has accepted the wife's payments, it will nevertheless as a rule be obliged to hand over the title deeds to the husband, as the legal owner, when the payments are completed. To safeguard her interests, the wife should be able to apply to the court for an order as to the disposition of the house. We consider that the court should have the widest discretion to deal with the matter as it thinks fit, having regard to the respective contributions of husband and wife to the purchase price of the house. The court should, for instance, be able to order the husband to convey his interest in the house to the wife on such terms as it thinks just and reasonable. It should also be able to order the house to be sold and the proceeds divided appropriately between husband and wife.

679. Provision for application to the court should, however, go beyond this. There might well be circumstances in which it would be unfair to the husband that the money he had paid on the house should be "frozen" until the wife had completed the payments. We consider, therefore, that either spouse should be able to apply to the court at any time for an order as to the disposition of the house, or the taking over of an interest in it.

Provision where the furniture is being bought on hire purchase

680. The wife may similarly suffer hardship if the furniture is being bought by the husband on hire purchase; he may stop payments and agree that the hire purchase firm should take back the furniture. We consider that essential furniture and household equipment being bought on hire purchase should be brought within the scope of the provision which we have suggested should be made where there is a mortgage on the home.

Application of our proposals to a husband who is left in the matrimonial home

681. We think that it would be desirable to extend to the husband any rights in respect of the matrimonial home and its contents which are conferred on the wife. We recognise that we are dealing essentially with a wife's problem, because it is usually the husband to whom the matrimonial home belongs; even if the home belongs to the wife it is much less likely that the

husband will suffer hardship if he has to leave, since it is as a rule easier for him to find somewhere else to live. But we think it right, if there is to be legislation in this matter, that husband and wife should be on the same footing. There may well be cases where it would be reasonable that the husband should be entitled to continue to live in his wife's house, if she has deserted him; for instance, if he has young children in his care. We recognise that in making this proposal we are curtailing the remedies provided for a wife, in Section 12 of the Married Women's Property Act, 1882, as against her husband, for the protection and security of her own property, but we think that the provision made by that Section is too wide in so far as it relates to the matrimonial home and its contents (see also paragraph 704).

Application of our proposals to Scotland

682. We consider that our proposals in paragraphs 667–681 should be extended to Scotland. As a matter of principle, we think it desirable that the laws of the two countries should be the same where questions of broad social policy are concerned. Moreover, we have satisfied ourselves that the hardship which the recent development of the English law has sought to alleviate arises in Scotland as in England. This was admitted to us by witnesses who did not themselves advocate any change in the law⁴⁹. We recognise that our proposals involve a departure from the principle which has been followed by the Scottish court, namely, that when issues as to property rights arise between husband and wife they are to be dealt with in the same way as if they arose between strangers (see paragraph 623). That principle has the merit of clarity and certainty but it may be said to be a little unreal to regard the partners to the marriage as being on the same footing as strangers; and, moreover, the strict application of the principle is apt to lead to injustice to one or other spouse, and particularly to the wife.

683. With regard to the provision to be made where the matrimonial home is being purchased through, for instance, a building society (see paragraphs 676–679), we appreciate that in Scotland the legal position is different in as much as it is the building society (or other lender) and not the person who has borrowed the money who is usually the legal owner of the house until the money has been repaid. If the society has accepted the wife's payments, it will nevertheless as a rule be bound to convey the house to the husband, as the original party to the agreement, on completion of the payments. Consequently, it would be just as necessary in Scotland as in England for provision to be made to allow the wife to apply to the court for an order as to the disposition of the house.

684. We contemplate that jurisdiction in respect of our proposals would be vested in the Sheriff Court and the Court of Session.

Recommendations: England and Scotland

685. We accordingly recommend, one member dissenting⁵⁰, that if one spouse has left the other spouse in the matrimonial home

- (a) he or she should not be able to turn out the other spouse or take away any of the essential contents of the home without an order of the court; and
- (b) the other spouse should be able to apply to the court for an order restraining (for such period as it thinks fit or until further order)

⁴⁹ See the supplementary evidence of the Law Society of Scotland (paragraph 5, Paper No. 142, in the Appendix to the Minutes of Evidence).

⁵⁰ Sir Frederick Burrows, whose views are set out at p. 342.

that spouse from disposing of any interest in the home or in the essential contents, or surrendering the tenancy; the order, when in restraint of the spouse disposing of any interest in the home or surrendering the tenancy, should be capable of registration as a charge on the land⁵¹; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation.

686. We further recommend, the same member dissenting⁵², that if one spouse has left the other spouse in the matrimonial home and has then failed to pay instalments under a mortgage, or under a hire purchase agreement in respect of any of the essential contents of the home, the person to whom such instalments are due should be bound to accept payment if tendered by that other spouse; either spouse should then be able to apply to the court at any time for an order as to the disposition of the house or the contents and the court should have power to make such order as it considers reasonable in the interests of both parties in the particular circumstances.

Provision for dealing with the occupation of the matrimonial home and the division of the contents after a decree of divorce, nullity or judicial separation

687. When the marriage has been terminated by divorce, we think that the court should have power, in England and Scotland,

(a) to deal with the occupation of the matrimonial home, and

(b) to make an equitable division of the contents between husband and wife.

We regard this as a desirable, and indeed necessary, extension of the wide power which we consider the court should have to make suitable financial arrangements when there has been a divorce.

688. If the husband owns⁵³ the matrimonial home (or it is jointly owned by husband and wife), we think that the court should be able to make an order allowing the wife to live in it, whether or not she was resident there when divorce proceedings were started. If there is a divorce, we see no reason why the husband should not be required to leave the matrimonial home, in order that his wife may go back, if the court considers this right in all the circumstances. It is merely a different way of making provision for the wife. In one case, the court may order the husband to pay to the wife a sum of money so that she can buy a home; in another, it may order him to allow her the use of the home.

689. If the matrimonial home is held under a tenancy, at a rent other than a ground rent, in the husband's name (or in the names of both husband and wife), we think that the court should have power to transfer the tenancy to the wife (whether or not she was resident there when divorce proceedings were started), where it is a statutory tenancy or a contractual tenancy to which the Rent Restriction Acts apply. Provided that the power is confined to such tenancies, we regard it as reasonable. The court will be able to satisfy itself that the wife has sufficient resources, from her own means or her husband's maintenance payments, to pay the rent. The landlord should have a right to be heard on the application, a right of

⁵¹ Lord Keith of Avonholm doubts whether there is any effective method at present of implementing in Scotland the part of this recommendation relating to registration. The Register of Inhibitions might conceivably be used to prevent a spouse owning his house from selling it, but there is no register, in his opinion, appropriate to the case of a spouse who is the tenant.

⁵² Sir Frederick Burrows.

⁵³ By "owns" we include tenure under a long lease at a ground rent.

appeal from the order and a right to apply at any time for cancellation of the order. Where the court makes an order transferring the tenancy to the wife she should assume joint responsibility with the husband for all outstanding liabilities, including the liability for payment of arrears of rent, at the date of the order. If the order transferring the tenancy is subsequently cancelled, the tenancy should normally revert to the husband.

690. We have confined our proposal in the last paragraph to tenancies to which the Rent Restriction Acts apply because we think that it would be undesirable to interfere with the rights of the landlord to this extent in respect of other tenancies. In any event, so far as periodic tenancies outside the scope of the Acts are concerned, it is not possible to afford the wife effective protection, since the landlord would always be free to give her notice to quit under the terms of the original agreement.

691. With regard to the contents of the home, we think that the court should be free to make such division between husband and wife as seems just and reasonable, irrespective of ownership. We do not mean to suggest that ownership is a consideration which the court should ignore ; sometimes it would be the determining factor, as, for instance, in dealing with works of art. But in dealing with the ordinary contents of the home, it may often be fair that the wife should receive a good share of the furniture which belongs to the husband ; and in some cases, for example where there are children to consider, it may be right that she should have virtually the entire contents of the home.

692. We would emphasise that in giving the court power on divorce to deal with the occupation of the matrimonial home and the division of the contents, we have very much in mind that this power, when taken together with the power to order a lump sum payment (see paragraph 516), will enable the court to give effective recognition, in appropriate cases, to the wife's contribution to the marriage, whether by her work in the home or by the help she has given her husband in building up or running his business.

693. We are recommending this extension of the power of the court primarily in order to deal with the situation on divorce, but we see no reason why our proposal should not also apply to decrees of nullity or of judicial separation. In dealing with the contents of the matrimonial home after a decree of judicial separation, however, the court should not have power to transfer ownership of the contents. We think it neither necessary nor desirable to provide for this where the marriage has not been brought to an end. The court should therefore be able to give the wife a right to the use only of articles belonging to her husband, on such conditions as it thinks fit.

694. In conformity with our general view, a husband should be given the same right of application to the court in respect of the matrimonial home and its contents as the wife. Such right of application should, however, be confined to the spouse, whether husband or wife, to whom a decree of divorce, nullity or judicial separation has been granted ; we can see no justification for an interference with property rights in the matrimonial home and its contents for the benefit of a guilty spouse.

695. We consider that the procedure in England for making an application, and the power of the court to make an order, for the disposition of the matrimonial home and its contents should be governed by the same considerations in respect of time as those which we are recommending should govern applications for maintenance (see paragraphs 505 and 509). That

is to say, the court should be able to make an order at the time of pronouncing a decree or at any time afterwards. Moreover, the claim should as a rule be made in general terms in the petition (or answer as the case may be), but the applicant should be able to apply to the court after the trial for leave to make his or her application. We contemplate, however, that an application for leave made after three months have elapsed from the date on which the decree *nisi* has been made absolute, should be granted by the court only in very special circumstances.

696. We suggest that a similar procedure should be adopted in Scotland.

Recommendations: England and Scotland

697. We accordingly recommend, one member dissenting⁵⁴, that, on the application of a husband or a wife who has obtained a decree of divorce, nullity of marriage or judicial separation, the court should have power to make one or more of the following orders:

- (i) An order allowing the applicant to reside until further order in the matrimonial home if this is owned by the other spouse (or is jointly owned by the spouses); the order should be capable of registration as a charge on the land⁵⁵; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation.
- (ii) An order substituting the applicant as tenant if the tenancy of the matrimonial home is in the name of the other spouse and is a dwellinghouse to which the Rent Restriction Acts apply (or as sole tenant if there is a joint tenancy).
- (iii) An order providing for an equitable division between the husband and the wife of the entire contents of the matrimonial home (including any articles being bought on hire purchase). In making such an order on a decree of divorce or nullity of marriage, the court should be able to transfer ownership (or the rights under a hire purchase agreement) in any articles from one spouse to the other, but on a decree of judicial separation the court should be able to award the use only, and until further order, to the one spouse of any articles owned by the other.

The provision recommended in paragraph 686 should be extended to apply to a spouse who has obtained an order allowing him or her to occupy the matrimonial home.

698. We further recommend, the same member dissenting⁵⁴, that, on the institution of proceedings for divorce, nullity of marriage or judicial separation, the court should have power, on the application of a party seeking a decree in his or her favour, to grant an injunction until further order against the other party restraining her or him from disposing of any interest in the home or its contents; the order, when in restraint of the spouse disposing of any interest in the home or surrendering the tenancy, should be capable of registration as a charge on the land⁵⁵; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation.

⁵⁴ Sir Frederick Burrows, whose views are set out at pp. 342-343.

⁵⁵ See footnote 51.

SAVINGS FROM HOUSEKEEPING MONEY

699. If a wife makes savings from an allowance made to her by her husband for housekeeping or for her dress expenses, under English and Scots law such savings (and any articles purchased out of them) will be regarded as belonging to the husband unless it can be shown that it was his intention that they should be a gift from him⁵⁶. The basis of the rule is that the wife is to be considered as her husband's agent in laying out the money.

700. As witnesses have pointed out, this rule has worked unfairly in a number of recent cases. We think that it is not in accord with the view of marriage as a working partnership, and that the right way is to look upon such savings as belonging half to the husband and half to the wife.

701. We accordingly recommend, in respect of England and Scotland, that savings made from money contributed by either the husband or the wife or by both for the purpose of meeting housekeeping expenses (and any investments or purchases made from such savings) should be deemed to belong to husband and wife in equal shares unless they have otherwise agreed.

PROVISIONS OF ENGLISH LAW OPERATING TO THE DISADVANTAGE OF THE HUSBAND

702. Two instances have been brought to our notice in which the English law as to property rights acts to the disadvantage of the husband as compared with the wife. We regard such discrimination today as anomalous and we are accordingly recommending that in each instance husband and wife should be put on the same footing.

Presumption of advancement

703. If a husband purchases property or makes an investment in his wife's name, it is presumed that he is making a gift to her, but if a wife purchases property or makes an investment in her husband's name there is no such presumption and, unless there is actual evidence to the contrary, the husband is regarded as holding the property or investment as trustee for his wife⁵⁷. We recommend that the presumption of advancement should operate in the husband's favour in the same way as it operates in the wife's favour.

Remedies for the protection and security of separate property

704. We have referred in paragraph 599 to the wife's special position under Section 12 of the Married Women's Property Act, 1882. We recommend that the remedies given to the wife by that Section, as against her husband, for the protection and security of her property, should also be conferred on the husband, as against his wife, for the protection and security of his property. As we have pointed out in paragraph 681, we contemplate that the remedies so conferred on a husband or a wife would be subject to the rights in respect of the matrimonial home and its contents which are provided for both husband and wife in our recommendation in paragraph 685.

⁵⁶ See *Blackwell v. Blackwell*, [1943] 2 All E.R. 579; *Hoddinott v. Hoddinott*, [1949] 2 K.B. 406; *Logan v. Logan*, 1920 S.C. 537; *Smith v. Smith*, 1933 S.C. 701.

⁵⁷ *Mercier v. Mercier*, [1903] 2 Ch. 98.

POWERS OF THE COURT UNDER SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT, 1882 : ENGLAND

705. We have made recommendations for dealing with certain issues which may arise between husband and wife affecting the matrimonial home and its contents. We realise that there may be disputes relating to property between husband and wife in many other circumstances. These disputes may at present be referred to the court under Section 17 of the Married Women's Property Act. Suggestions were made to us that the court should be given additional powers under this Section. The case of *Tunstall* (see paragraph 601) has shown that it would be desirable that the court should be able to order one spouse to pay the other spouse a sum of money in compensation for the loss of an interest in property to which that other spouse has been able to establish a title; and we recommend accordingly. It was said that there is some uncertainty whether the court has power to order a sale of property, if it comes to the conclusion that a sale would be the only reasonable solution to the dispute between husband and wife. It has now been said that the court has such a power⁵⁸, but if there is any doubt we think that power to order a sale of property should be expressly conferred on the court.

OTHER MATTERS BEARING ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE

Disclosure of financial position of husband and wife

706. Some witnesses suggested that each spouse should be entitled by law to be informed of the financial position of the other. It was said that if equality of rights in the home is to become a practical matter this is an essential preliminary which must be satisfied; that it would lead to greater frankness between husband and wife on money matters, thus removing or lessening one of the potent causes of matrimonial troubles; and that it would prevent a wife from having to keep house on a quite inadequate sum, when her husband could well afford to give her more.

707. Suggestions for giving practical effect to a statutory requirement that each spouse should disclose his or her financial position to the other were that:

- (i) either spouse should be able to apply to the court for an order requiring the other spouse to make a full disclosure of his or her assets, liabilities and earnings;
- (ii) either spouse should be able to obtain a copy of the other spouse's pay slip from his or her employer;
- (iii) either spouse should be able to obtain from the appropriate Inspector of Taxes a copy of the other spouse's income tax return or of the certificate supplied by his or her employer as to his or her earnings and deductions for income tax.

708. We thought it useful to obtain additional evidence on these proposals, since a number of bodies and organisations, whose experience qualified them to express an opinion, had not in fact put forward any views⁵⁹. The weight of this evidence was decidedly against any proposal to give a spouse a legal right to be informed of the other spouse's financial position.

⁵⁸ See *Cobb v. Cobb*, [1955] 1 W.L.R. 731.

⁵⁹ This evidence is set out in Part II of the Appendix to the Minutes of Evidence.

709. It is right that each spouse should be ready to disclose his or her financial position to the other, as an expression of that mutual trust and confidence which is the basis of a truly happy and successful marriage. If husband and wife cannot discuss together in complete frankness the family spending, that is bound to some extent to affect the married life, though we are inclined to think that where the marriage finally breaks down, quarrels over money matters are usually a symptom of a more fundamental disharmony rather than in themselves a primary cause of the breakdown.

710. After weighing all the evidence before us, we have decided that this is not a matter where legal provision would be appropriate. Specific objections can be brought against the proposals to give a spouse a right to obtain a copy of the other spouse's pay slip or a copy of his or her income tax return or of the certificate as to earnings and tax deductions. We accept the criticism made by representatives of the employers and by the Trades Union Congress that it would be undesirable to bring employers into the private affairs of their employees and that to do so might be detrimental to good industrial relations. We also appreciate the force of the argument advanced by the Board of Inland Revenue that it is of essential importance to maintain the principle that disclosures made in income tax returns are completely confidential.

711. It is, however, on wider considerations that we have finally rejected these proposals, as well as the alternative suggestion that there should be a right to apply to the court for an order requiring a spouse to make a full disclosure of his financial position. These considerations have been aptly expressed by two witnesses⁶⁰, and we quote their words:

"In our view such a provision would not ensure a more secure foundation for marriage. It would tend to militate against those feelings of mutual confidence, trust and respect which inspire and, in the majority of cases, sustain the matrimonial relationship. Generally, we believe that the law should not concern itself with happy marriages and we would be against the creation of any legal background to the natural love and affection which alone provide the most secure foundation for matrimony"; and

"If marriage is to be a partnership based upon equality, it can only be truly realised as such by the exercise of mutual trust. The exercise of the rights which the proposals would confer upon the spouses would seem to be the negation of this mutual trust."

The wife's loss on divorce of entitlement to benefits under the National Insurance Scheme

712. On divorce a wife loses her right to benefits under the National Insurance Scheme which derive from her husband's contributions⁶¹. It was pointed out to us that this may represent a serious financial loss, especially for the elderly wife, who is unlikely to be able to qualify for the full amount of the retirement pension (and may indeed not qualify at all), unless she herself has been contributing during marriage. We agree that as the National Insurance Scheme operates at present the wife who has divorced her husband and does not marry again may suffer hardship and we think that some amendment is desirable to improve her position.

⁶⁰ See paragraph 1, Paper No. 141 (London Magistrates' Clerks' Association), and paragraph 2 (1), Paper No. 146 (Free Church Federal Council), in the Appendix to the Minutes of Evidence.

⁶¹ An exception to this rule is that if, at the time of divorce, a woman is already drawing a retirement pension by virtue of her husband's insurance, that pension will continue unless and until she marries again.

713. In the first place, we consider that provision should be made to allow a wife who has divorced her husband to use the contributions which he made under the National Insurance Scheme, during the marriage, to help her to qualify for a retirement pension on reaching pensionable age. We appreciate that our aim would also be achieved by placing on all women an obligation to contribute, or by allocating a definite part of every husband's contributions to his wife's own insurance record. This was the method advocated by some witnesses, but it would mean a radical alteration of the Scheme as it affects married women and as such is outside our terms of reference.

714. Our attention was also drawn to the absence of any provision in the Scheme for a payment equivalent to the widowed mother's allowance to be made to a wife who has divorced her husband and who has the children in her care, when their father dies. It is apparent that the lack of such provision may result in hardship to the children, since as a rule the father will have been at least helping with their maintenance. We therefore consider that when the children are living with their mother, it should be made possible for her to draw an allowance for them, under the National Insurance Scheme, if her former husband dies and in consequence she is deprived of the money which he has been contributing for the children's support.

715. There is the further question whether a wife who has divorced her husband should be entitled on his death to benefits equivalent to those now payable to a widow. This is a matter which, we think, merits consideration in any review of the National Insurance Scheme.

716. During our inquiry we learnt that the National Insurance Advisory Committee had been asked to undertake a review of the provision made under the National Insurance Scheme for the dependants of insured persons. We accordingly informed the Ministry of Pensions and National Insurance of our views, as we have set them out above, so that they might be made available to the Committee, in advance of the submission of our Report.

Assessment for income tax

717. A number of our witnesses criticised the present law, under which the incomes of husband and wife, as a general rule, are aggregated for the assessment of tax, on the ground that this practice is not in accord with the accepted view of the wife as an equal partner in the marriage, that consequently it causes friction in the home, and that it encourages the forming of illicit unions, because it can be much more profitable, financially, for a man and woman to live together unmarried, than married. The law should, it was suggested, be altered so that the income of each spouse is assessed and taxed as that of a separate individual and each is liable for his or her own tax. Alternatively, it should be possible for the husband to elect that his wife's income should be treated separately.

718. We are very doubtful if this is a matter which may be regarded as coming within our terms of reference; it raises issues of considerable complexity which would require careful study; and, lastly, it has already been reported on by another Royal Commission⁶². In the light of these considerations, we have decided to express no views on the evidence submitted to us.

⁶² See paragraphs 117-121 of the Second Report of the Royal Commission on the Taxation of Profits and Income (Cmd. 9105).

PART X

VOLUNTARY AGREEMENTS FOR SEPARATION OR MAINTENANCE

A. ENGLAND

SEPARATION AGREEMENTS

719. The essential feature of a separation agreement is that the parties agree thenceforth to live separate and apart. The Ecclesiastical Courts looked on these agreements as contrary to public policy and void, but, as a result of a series of judicial decisions, it became accepted that it is a matter between husband and wife if they choose to live separate and apart. Consequently, the present position is that, *prima facie*, a separation agreement prevents either spouse from alleging desertion as from the date of execution of the agreement. Desertion may, however, be held to have supervened on a separation by mutual consent if it can be shown that the separation has lost its consensual element on both sides; for instance, if one spouse has repudiated the agreement (e.g., by failing to pay the agreed maintenance) and shows an intention to desert and the other spouse has shown a *bona fide* willingness to resume married life¹.

720. We received very few suggestions for amendment of the law regarding separation agreements. One witness proposed that the Scots rule whereby a separation agreement is revocable at pleasure by either spouse should be adopted in England. Another suggestion was that after a separation by agreement had lasted six months, if either spouse made a *bona fide* request to the other for a resumption of cohabitation, a refusal by the other without good cause should amount to desertion. The Gorell Commission² recommended that the High Court should have power, on the application of either spouse, to set aside a separation agreement.

721. We have had no evidence of any general dissatisfaction with the existing law in England and we do not recommend any change. Our recommendation in paragraph 158 is designed to provide relief for any long-standing cases of hardship resulting from separation agreements entered into before the passing of the Matrimonial Causes Act, 1937.

MAINTENANCE AGREEMENTS

The present law

722. Terms making financial provision for the wife are usually included in a separation agreement. Often, however, husband and wife will not bind themselves by a separation agreement but instead will enter into a maintenance agreement, which, besides providing for the maintenance of the wife whilst the spouses are living apart, may also embody other financial arrangements, such as the disposition of the matrimonial home and the education of the children.

723. These maintenance agreements are normally enforceable by the wife. Judicial decisions have made it clear, however, that where an agreement contains an undertaking by the wife not to apply to the court for further

¹ *Pardy v. Pardy*, [1939] P. 288.

² Cd. 6478, paragraph 453.

maintenance, there are certain limitations on the extent to which the agreement is valid or enforceable, as follows :

- (i) It is contrary to public policy that a wife should be able to give up the right conferred on her by statute to apply to the court for maintenance³.
- (ii) It follows that her undertaking not to apply to the court for maintenance does not bar her from applying to the High Court or a magistrates' court on the ground of her husband's wilful neglect to provide reasonable maintenance, although the husband has kept up the payments he covenanted to make⁴.
- (iii) The wife's undertaking not to claim maintenance is no answer to a claim by the National Assistance Board against the husband in respect of money paid by the Board to the wife for her support⁵.
- (iv) Whilst the wife's undertaking not to claim maintenance cannot be enforced against her by the husband, the other terms of the agreement usually remain in force and are enforceable against the party bound by them. If, however, the agreement was made in contemplation of or in the course of divorce proceedings, and an undertaking by the wife is the main consideration for the payment of maintenance to her by the husband, the wife cannot enforce the maintenance payments if the husband defaults⁶. She is not left without a remedy since she can apply to the Divorce Division for a maintenance order, though usually she would have to obtain leave to make the application as the time for doing so would have expired. Other terms, dependent on the wording of the agreement, may possibly be severed from the void terms and enforceable.

Evidence and proposals

724. The present law was criticised by witnesses on two grounds. In the first place, it was said that it was unjust that the husband should be strictly bound by the maintenance agreement while his wife was free to obtain provision for her maintenance over and above the amount stated in the agreement. Secondly, it was said that the decision in *Bennett* had caused hardship to some wives who now found that they could not enforce the maintenance terms in their agreements. In particular, if the former husband had died, the wife would have no remedy at all, since under the present law she has no right to apply to the Divorce Division for maintenance to be paid to her out of her former husband's estate.

725. The General Council of the Bar recommended that legislation should be passed to modify the effect of the judgments in the cases of *Bennett* and *Tulip* so that maintenance agreements should be binding between parties who entered into them. The Law Society accepted the decision in *Bennett* but suggested that an agreement entered into before the date of that decision should be treated as valid and enforceable if the former husband were now dead. A further proposal was that all agreements entered into before the case of *Bennett* and invalidated by that decision should be valid and enforceable.

The Commission's views and recommendations

726. We consider that some amendment of the present law is desirable. First, the extent to which the terms of existing agreements are valid and

³ *Hyman v. Hyman*, [1929] A.C. 601.

⁴ *Morton v. Morton*, [1942] 1 All E.R. 273; *Tulip v. Tulip*, [1951] 2 All E.R. 91; *Dowell v. Dowell*, [1952] 2 All E.R. 141.

⁵ *National Assistance Board v. Parkes*, [1955] 3 W.L.R. 347.

⁶ *Bennett v. Bennett*, [1952] 1 K.B. 249.

enforceable is left uncertain, depending on whether the wife's undertaking not to apply to the court for maintenance can be severed from other terms. Secondly, hardship is caused where a wife cannot enforce the maintenance term in her agreement. Thirdly, it seems to us that if the wife is to be allowed to apply to the court for an increase in the amount of maintenance provided under an agreement, on the ground of her husband's wilful neglect to provide reasonable maintenance, then it is only fair that the husband should be able to apply to the court for a reduction in the amount which he has undertaken to pay, on the ground that owing to changed circumstances it is reasonable that the amount should be reduced.

727. Various possibilities were open to us but after careful examination we have concluded that as a general rule maintenance agreements should be binding and enforceable on the parties to them. If, however, owing to fresh circumstances the terms regulating the financial position of the parties have become inequitable, either party should be able to apply to the court for an order varying the agreement. We recommend accordingly⁷. The effect of our proposal will be as follows :

- (i) the wife will be bound by an undertaking not to apply to the court for maintenance for herself⁸ so long as the circumstances remain as they were at the time of making the agreement, but, should fresh circumstances intervene whereby it would be inequitable to hold her to the undertaking, she will be able to apply to the court for variation ;
- (ii) the husband will be bound to make payments in the agreed amount, but will have the right to apply to the court for a reduction in that amount if warranted by a change in his or his wife's circumstances.

728. We consider that the Divorce Division of the High Court and magistrates' courts should have jurisdiction, though the powers of the latter should be restricted in the way we describe below. It should be possible for a party to apply for variation during the subsistence of the marriage and after its termination by decree of the court.

729. With regard to the High Court, we consider that the court should have the fullest possible power to deal as it thinks fit with a maintenance agreement. Accordingly, we recommend that it should have power, on proof that owing to fresh circumstances the financial terms of the agreement have become inequitable,

- (i) to cancel any or all of those terms ;
- (ii) to vary any of those terms ;
- (iii) to make an order providing for the maintenance of one party (or of the children) by the other party.

With such a power the court would be able, for instance, wholly to cancel the agreement and to make instead an order for maintenance for a greater or lesser amount than was provided under the agreement ; or to cancel one term in the agreement and make instead an order for the payment of a larger or smaller sum ; or to direct that the agreement be varied by substituting a larger or smaller amount for the amount which the agreement provides. We appreciate that in varying an agreement the court would in effect be forcing a new agreement upon the parties, one of whom might well be an unwilling party to it. However, the proposed power is closely analogous to the power which the High Court at present exercises in respect of the variation of marriage settlements on divorce and in fact maintenance agree-

⁷ We intend our recommendation to apply as well to financial terms in a separation agreement.

⁸ We contemplate that an undertaking by the wife not to apply to the court for maintenance for the children would still be void as being contrary to public policy.

ments entered into during the marriage may at present be dealt with by the court as post-nuptial settlements on a divorce. In our view, there can therefore be no objection on this ground.

730. With regard to magistrates' courts, we consider that

- (1) they should have power to deal only with those terms of an agreement which provide for the payment of maintenance by one party to the other (whether for that party's own benefit or for the benefit of the children); and
- (2) their power of cancelling or varying the terms of the agreement or substituting an order should be exercisable only if (a) the provision which they are being asked to consider is within their financial limits, and (b) they are not being asked to make an order the effect of which would be to provide for the payment of an amount outside their financial limits.

We recommend accordingly. We appreciate that to give a magistrates' court power to deal with maintenance agreements is, in effect, introducing a new principle into the matrimonial jurisdiction of the magistrates' courts, but we can see no objection to giving them this power if it is limited in the way we have described.

731. We recommend that the High Court should have jurisdiction to entertain proceedings for the variation of a maintenance agreement if (i) both husband and wife are domiciled in England, or (ii) both husband and wife are resident in England. The jurisdiction of the magistrates' court should be based on (i) or (ii) above, coupled with the fact that the husband or the wife is resident within the court's district.

732. We think that where, on an application to vary a maintenance agreement, the High Court or a magistrates' court orders the payment of maintenance, such order should be subject to the rules applicable to maintenance orders which have been made on complaint of a matrimonial offence: that is to say, the machinery for collection and enforcement should apply, wherever appropriate, including the machinery which we have recommended for the transfer of High Court orders to magistrates' courts (see Part VIII).

733. A maintenance agreement may provide that payments should be made to the wife for her life. It might happen that a wife who has divorced her husband and who has relied on a maintenance agreement would find it necessary to apply to the court after the death of her former husband for increased maintenance out of his estate. We see no reason why, subject to a proper time limit, she should not be able to obtain an order if she makes out a sufficient case. We suggest, however, that jurisdiction in these circumstances should be exercised solely by the High Court.

B. SCOTLAND

734. Scots law differs from English law in that in Scotland a contract of separation is revocable at pleasure by either spouse⁹. An admission in the contract of conduct which is *prima facie* a ground of separation, however, prevents revocation of the contract by the offending spouse until it is judicially established that decree of separation is not warranted. The wife may sue for arrears of aliment under the contract until the contract is revoked.

735. We received no evidence on this matter from our Scottish witnesses. We understand that the law is regarded as satisfactory and we suggest no alteration.

⁹ According to Lord Fraser, this derives from the old concept, common to both England and Scotland, that voluntary contracts of separation are void as being contrary to public policy. (See *Fraser on Husband and Wife*, Second Edition, p. 911 (Vol. II, 1878).)

PART XI

THE COURT WHICH SHOULD HAVE JURISDICTION OVER MATRIMONIAL CAUSES

A. ENGLAND

The present system

736. Jurisdiction to try suits for dissolution of marriage, nullity, judicial separation, restitution of conjugal rights and jactitation of marriage, legitimacy proceedings and proceedings under Section 23 of the Matrimonial Causes Act, 1950, is vested in the Divorce Division of the High Court. These causes may be tried by any judge of the Division (including the President), any other judge of the High Court for the time being exercising jurisdiction in matrimonial causes (namely, a Queen's Bench judge on assize), or any commissioner for the time being exercising jurisdiction in such causes (namely, a Special Commissioner in Divorce or a Commissioner of Assize).

737. There are at present eight judges of the Divorce Division (including the President). (Some part of their time is of course spent on probate and admiralty work, and in the Divisional Court.) All county court judges are Special Commissioners in Divorce, and a number of Queen's Counsel have also been appointed Special Commissioners.

738. In London, all defended cases are heard by the judges of the Divorce Division or by Queen's Counsel sitting as Special Commissioners in Divorce; five or six of the latter usually sit daily during term. Undefended cases are heard mainly by county court judges sitting as Special Commissioners in Divorce. County court judges do not try defended cases in London owing to the administrative difficulties involved in arranging the rota of sittings.

739. In the provinces, divorce cases are tried at forty-two towns throughout the country. At a number of these towns assizes are held. Long defended cases (i.e., matrimonial suits the hearing of which is estimated to take more than three hours) are for the most part tried at the assize towns by judges of the High Court or by Queen's Counsel sitting as Special Commissioners in Divorce. Seven of the assize towns, at which the divorce lists are heaviest, are visited by a judge of the Divorce Division. At the other assize towns long defended cases are heard by judges of the Queen's Bench Division on circuit. When there is too much work for the judges, a Special Commissioner may be sent to try the matrimonial causes after the judge on circuit has left. Undefended cases and short defended cases (i.e., matrimonial suits the hearing of which is estimated to take less than three hours) are heard mainly by county court judges sitting as Special Commissioners in Divorce.

740. The above arrangements were developed as a result of recommendations made by the Denning Committee¹, and were introduced in order to cut down delay in cases coming on for trial. In this, they have been successful.

741. As the Denning Committee pointed out, the Gorell Commission in 1912 had made a recommendation on similar lines for the appointment of county court judges to act as commissioners in divorce, in order to make facilities for divorce more readily available to persons of small means.

¹ Cmd. 6945, Second Interim Report.

Retention of jurisdiction in the High Court

742. The main question which we had to consider is whether jurisdiction in divorce should continue to rest exclusively with the High Court ; and, if so, whether any changes should be made in the present arrangements for exercising that jurisdiction. We have come to the conclusion that it should so continue, and that it is desirable that all divorce cases should be tried by judges of the High Court. We therefore recommend :

- (a) that the High Court should continue to exercise exclusive jurisdiction in divorce, and
- (b) that steps should be taken as soon as possible to enable all divorce cases to be tried by judges of the High Court.

We reached these conclusions after careful consideration of the various proposals submitted to us, which are discussed in the paragraphs below.

Proposals for a new system

(1) PROPOSAL TO ESTABLISH "FAMILY COURTS"

743. A limited number of our witnesses recommended the abolition of the present matrimonial jurisdiction of the High Court and (in some instances) the magistrates' courts, the jurisdiction to be assumed instead by a new form of tribunal, which for convenience we refer to as the "Family Court". Their proposals as to the powers and composition of the proposed tribunals varied, but generally it was contemplated that the new courts would operate an informal procedure such as exists in the present juvenile courts and would have available to them the services of specially qualified lay persons. The proposals were not developed at length, but underlying the suggestions of some witnesses was the view that matrimonial proceedings are in some sense different from all other types of litigation and that the legal concepts and procedure followed by the present courts are inadequate for dealing with problems of such an intimate and personal nature. Sometimes, the proposals for "Family Courts" were linked with proposals for the adoption of a new principle, either in addition to, or in substitution for, the present principle on which the divorce law is based.

744. So far as the present magistrates' courts are concerned, such criticisms as were made in support of the change related primarily to specific matters concerning the composition and procedure of those courts. The criticisms, if accepted, could be met without any change in the existing jurisdiction. They are discussed in Part XIV, dealing with matrimonial proceedings in magistrates' courts.

745. The witnesses themselves, however, recognised that the institution of specialised "Family Courts" might be premature at the present time and some put forward alternative proposals (see below) for changes within the framework of the various courts already in existence.

746. One witness put forward a different type of proposal for specialist matrimonial and family courts. He suggested that all matrimonial causes and matters at present dealt with by the High Court and the magistrates' courts should be brought under one system of courts to be presided over by judges experienced in matrimonial law. Within this system would be two types of tribunal, one presided over by judges of the High Court and the other by judges of the status of county court judges. Defended divorce cases would be tried in the higher tribunal and undefended divorce cases in the lower tribunal, which would also take over the present matrimonial jurisdiction of the magistrates' courts.

747. We do not recommend the introduction of any system of "Family Courts". If a radical change were to be made in the basis on which divorce is granted, then it might reasonably be argued that the present judicial system would not be best adapted for the consideration of the issues which would then require determination, issues which would often be basically different from those arising today. But we think that a less formal tribunal, such as the witnesses usually contemplated, would be quite unsuited for the trial of divorce cases under the present law, for which high judicial qualities in our opinion are essential. The proposal referred to in paragraph 746 would not be open to this objection but we cannot see what practical advantages it would secure which would justify the expense entailed and the considerable inconvenience which would result during the period of transfer from the present to the new system.

(2) PROPOSAL THAT COUNTY COURTS SHOULD EXERCISE DIVORCE JURISDICTION

748. Some witnesses recommended, as an alternative to their proposals for the institution of "Family Courts", that the county courts should have matrimonial jurisdiction, either exclusively, or concurrently with the High Court. Similar proposals were made independently by a small number of other witnesses. In support of giving such jurisdiction to the county courts it was said that a county court constitutes an adequate, inexpensive and readily accessible local tribunal; that the county court judges at present acting as Special Commissioners in Divorce are proving competent and equal to the task; and that it therefore seems reasonable to end the present compromise by taking the final, logical step of giving jurisdiction in divorce to the county courts as such.

749. The proposal that county courts should exercise divorce jurisdiction was strongly opposed by a number of other witnesses, primarily on the view that the dissolution of marriage is so serious a matter, not only for the parties but also for the community, that only the highest tribunal should deal with it. The question of which courts should exercise divorce jurisdiction has already been the subject of inquiry on various occasions in the past, notably by the Gorell Commission, and in recent years by the Denning Committee, which dealt with the matter in its Second Interim Report. The principle which has hitherto prevailed is clearly stated in the following extract from the Report of the Gorell Commission:

" . . . the gravity of divorce and other matrimonial cases, affecting as they do the family life, the status of the parties, the interests of their children, and the interest of the State in the moral and social well-being of its citizens, makes it desirable to provide, if possible, that, even for the poorest persons, these cases should be determined by the superior courts of the country assisted by the attendance of the Bar, which we regard as of high importance in divorce and matrimonial cases, both in the interests of the parties and in the public interest."²

750. We accept that principle as sound, and as being just as applicable today as in 1912. We also agree with the view of the Denning Committee that the manner in which divorce is effected does influence the attitude of the community towards the status of marriage. The Committee said: "If there is a careful and dignified proceeding such as obtains in the High Court for the undoing of a marriage, then quite unconsciously the people will have a much more respectful view of the marriage tie and of the marriage status than they would if divorce were effected informally in an inferior court". We endorse these words.

² Cd. 6478, paragraph 106.

751. The county court judges and Queen's Counsel who at the present time exercise divorce jurisdiction do so as Special Commissioners. In dealing with divorce and other matrimonial causes they are accorded the powers and dignity of a High Court judge. The jurisdiction thus remains exclusively a jurisdiction of the High Court. We consider it of the highest importance that the principle should be maintained that the jurisdiction in divorce is essentially one for the High Court.

(3) PROPOSAL THAT MAGISTRATES' COURTS SHOULD EXERCISE DIVORCE JURISDICTION

752. A few witnesses contemplated that in certain circumstances the magistrates' courts should have divorce jurisdiction. Their proposals were, however, related to others which they made for new grounds of divorce, and to various procedural suggestions for the disposal of cases brought upon those grounds. It seems clear that such a proposal would not attract any substantial measure of support. For our part, as we have explained, we consider it most important that the jurisdiction in divorce should continue to rest solely with the High Court.

(4) PROPOSAL FOR TRANSFER OF DIVORCE JURISDICTION TO THE QUEEN'S BENCH DIVISION OF THE HIGH COURT

753. This proposal attracted very little support. It was in fact put forward as an alternative by a body which favoured the transfer of divorce jurisdiction to the county courts, on the basis that if it were decided to retain divorce jurisdiction in the High Court then the jurisdiction should be transferred to the Queen's Bench Division. The principal argument advanced in support was that it is unfair on the judges of the Divorce Division to expect them to try an unending monotony of divorce cases for most of their judicial career.

754. The question whether the work of the Probate, Divorce and Admiralty Division should be divided between the other two Divisions of the High Court has been considered on three occasions in the last twenty-five years: by the Business of Courts Committee in 1933³; by the Royal Commission on the Despatch of Public Business at Common Law in 1934-36⁴; and recently by the Committee on Supreme Court Practice and Procedure (the Evershed Committee)⁵. The Business of Courts Committee recommended a division of the work; the other two bodies rejected this suggestion. None of these bodies was charged to examine the question specifically from the aspect of the most efficient handling of divorce and other matrimonial causes. Regarded purely from that point of view, we cannot recommend that the matrimonial work of the Probate, Divorce and Admiralty Division should be transferred to the Queen's Bench Division. We consider that it is far better, both as a matter of principle and on practical considerations, that divorce jurisdiction should remain, as at present, in a Division which is mainly concerned with that work.

Suggested changes in the present system

755. It was suggested in the evidence submitted by the General Council of the Bar of England and Wales⁶ that the time had now come to give up the present scheme of special commissioners and to appoint to the Divorce Division a sufficient number of additional judges to enable all divorce cases

³ Cmd. 4471, Second Interim Report.

⁴ Cmd. 5065.

⁵ Cmd. 8878.

⁶ Paper No. 4, Minutes of Evidence, Second Day.

in the country, defended and undefended, to be tried by full-time judges of the High Court. It was argued that it is essential that there should be uniformity as far as possible in the high standard of judicial ability; that the standard of presentation of cases should be kept uniformly high; that the public is not satisfied with the present arrangements; and that the public fails to distinguish between a county court judge sitting for divorce as a Special Commissioner of the High Court and the same judge sitting on other matters as a county court judge.

756. We have given very careful consideration to this proposal. As we have said, the present system of special commissioners was devised in order to deal expeditiously with the very heavy post-war divorce list. It was not intended as a permanent administrative change, but as a temporary measure to deal with an immediate problem. The system has the merit of being very flexible and it seems to us, on the whole, to have worked well. We have, however, had some evidence suggesting that the highest standards of presentation and trial have not always been attained in individual cases. In this connection we would add that we regard it as most important that very great care should be taken over undefended cases. They may be neither easy nor straightforward and some pains may be necessary to get at the truth. But, whatever trouble may be required, it is essential that people should realise that divorce is a serious matter and that it does not follow that a decree is always granted if the case is undefended.

757. The appointment of barristers as Special Commissioners in Divorce is open to the objection that such appointments lack security of tenure and that it may therefore be difficult to find a sufficient number of suitably qualified people to take on this work because of the threat to their practice. But it would be impracticable to confine the appointment of special commissioners to county court judges. The county court judges at present hear undefended cases in London and undefended and short-defended cases in the provinces. To require them to hear long-defended cases would undoubtedly cause serious interference with the judges' county court work. On the other hand, we cannot see any practical advantage in appointing barrister commissioners on a permanent and full-time basis (as one witness suggested); and it would, in our opinion, be inadvisable to create what would be in effect a new judicial post.

758. It is in our view desirable that there should be a return as soon as possible to the system under which all cases, defended and undefended, are tried by judges of the High Court. We appreciate that the system of special commissioners has been kept in being for much longer than was contemplated when it was instituted, because the volume of divorce work has remained so very substantial. But we consider that it would be unwise to continue indefinitely with a system under which, while the jurisdiction remains in the High Court, much of the work is not dealt with by judges of the High Court. After most careful consideration of the issues involved, we have come to the conclusion that the decision should now be taken to dispense as soon as possible with the services of Special Commissioners in Divorce. For the reason we have given, we suggest that it would be advisable to dispense first of all with the services of barristers as special commissioners.

759. We realise that it will not be practicable to give immediate effect to our recommendation. On an estimate we have made, some fifteen additional judges would be required to replace all the special commissioners who are

at present trying divorce cases. We do not suggest that it would be advisable to appoint at once so large a number of judges. Apart from difficulties of selection, there would be the practical consideration that the accommodation available for High Court judges is at present limited.

760. Moreover, we hope that so very large an increase in the strength of the Divorce Division will not be required. We think that some reduction in the divorce rate may reasonably be expected if the measures to which we have referred in paragraphs 51-53 are implemented without delay. But we wish to make it plain that whatever number of judges may prove to be necessary, it is our view that that number should be appointed, and that accommodation consistent with the dignity of the High Court should be provided for them.

B. SCOTLAND

761. In Scotland, the Court of Session has exclusive jurisdiction in actions of divorce and nullity ; actions of separation and aliment and adherence and aliment may be raised either in the Court of Session or in the Sheriff Court. Most of our Scottish witnesses appear to have assumed that those arrangements would continue, and a number of them stated specifically that they were strongly opposed to any change in the present arrangements.

Proposal to give divorce jurisdiction to the Sheriff Court

762. The main question which we had to consider was whether the Court of Session should continue to have exclusive jurisdiction in divorce, or whether a concurrent jurisdiction in divorce should be conferred on the Sheriff Court.

763. The chief proponents of the latter suggestion were the Faculty of Procurators of Greenock and the Faculty of Procurators in Paisley. The Greenock Faculty addressed an enquiry to the other local legal societies. We were informed that twelve societies (including the Royal Faculty of Procurators of Glasgow) were opposed to the proposal while eleven (including the Greenock and Paisley Faculties) were in favour of it. Two societies were divided in opinion and the remaining six did not express any views. The Faculty of Advocates, the Law Society of Scotland, the Society of Writers to Her Majesty's Signet and the Society of Solicitors in the Supreme Courts, were against the proposal.

764. Those who put forward the proposal did so on the ground that the Sheriff Court would provide a forum which would be easily accessible and less expensive for the litigant. At present, there was incidental expense as a result of journeys to, and sojourns in, Edinburgh, not only for the parties, but for witnesses and local solicitors, since a litigant residing outwith Edinburgh has to instruct a local solicitor who in turn must instruct a solicitor in Edinburgh to institute or defend the proceedings there. Further, since only members of the Faculty of Advocates have the right of audience in the Court of Session, an advocate must be instructed to conduct the hearing of the case in court. Thus, even in an undefended action it is necessary for the pursuer in such cases to employ and pay for the services of three different lawyers. Moreover, in cases brought under the Legal Aid Scheme the expenditure is increased, since in such cases the enquiry into the application is also conducted in Edinburgh. It was therefore contended that by conferring a concurrent jurisdiction in divorce upon the Sheriff Court there would be a substantial reduction in expense and much less inconvenience for the litigant.

The Sheriff Courts could, it was said, undertake the hearing of divorce actions without undue difficulty, since at the present time they exercise a concurrent jurisdiction with the Court of Session in other matters of an equally important and delicate nature, such as, for example, actions of separation and aliment, adherence and aliment and adoption of children. In such cases, it was argued, the issues of fact and law were often as complicated and as difficult of decision—if not more so—as in many actions of divorce.

The Commission's views and recommendations

765. Considering only the practical grounds of expense and convenience to the litigant, we are not satisfied that a sufficient case has been made out for the acceptance of the proposal. From the evidence we received, it does not seem that the expenses in an ordinary undefended action (and these comprise the great majority of actions) are unduly burdensome for the litigant. Since the bulk of the population is resident in the Central Lowlands, litigants are generally within easy reach of Edinburgh. In such cases the expense and inconvenience of travel to and from Edinburgh cannot be excessive. Moreover, some expense would usually be incurred in travel to the Sheriff Courts, a point which perhaps the witnesses did not take sufficiently into account.

766. Nor have we received any evidence that the present arrangements result in delay for the litigant. On the contrary, the Court of Session has at all times been able to handle the cases coming forward, even in the peak year, 1946, when the total number of divorce and separation actions in which final judgment was given was 2,913.

767. It was also pointed out to us that if the Sheriff Courts were to have divorce jurisdiction, the main burden of work would fall on the busiest courts within the most populous areas and some increase would almost certainly be required in the number of Sheriffs and court staff.

768. We consider, further, that the wider considerations referred to in paragraphs 748–751 with reference to the proposal to extend divorce jurisdiction in England to the county courts apply equally to Scotland. Divorce jurisdiction has rested with a central judicature in Scotland ever since divorce was introduced at the time of the Reformation, first in the hands of the Commissary Court in Edinburgh and, since 1830, in the Court of Session. There is obvious advantage in actions of this kind, which affect status, being dealt with by a single tribunal, and we consider that this should continue to be so unless compelling reasons can be adduced to justify a change. In this respect we concur in the views expressed by the Royal Commission on the Court of Session and the Office of Sheriff Principal, which reported in 1927⁷.

769. In a matter of such importance as divorce, uniformity of administration must be a prime object, and this is better secured through the judges of the Outer House—in touch with their colleagues and in close contact with the general course of decisions in a centralised Supreme Court—than it would be through the exercise of numerous concurrent jurisdictions in the Sheriff Courts. It would defeat the chief object of the proposal if due uniformity could be achieved only at the cost of frequent appeals to the Court of Session.

⁷ Cmd. 2801.

770. It must also be borne in mind that the great majority of divorce cases are undefended ; the exercise of jurisdiction in such cases may be difficult and delicate and the difficulty is enhanced by what is necessarily a one-sided presentation of the case. The risks inherent in such a situation are, however, diminished under the present arrangements by the employment of counsel having a high sense of responsibility as members of the "College of Justice" and in daily touch with the decisions and practice of the court. That would no longer be true if cases were heard in the Sheriff Courts, where, it has been suggested, the case could be conducted by a single solicitor.

771. These considerations seem to us to weigh decisively against any change in the present divorce jurisdiction in Scotland. We therefore recommend that in Scotland the Court of Session should continue to exercise an exclusive jurisdiction in divorce.

PART XII

THE BASIS OF MATRIMONIAL JURISDICTION AND THE RECOGNITION OF THE JURISDICTION OF OTHER COUNTRIES

INTRODUCTORY

Private international law

772. In every action which comes before it, the court must first decide whether it has jurisdiction to try the issues between the parties. No difficulty arises in an action relating to status where, as is usual, the parties are domiciled in and nationals of the country in which the action is being tried. In order to prevent hardship, however, it may be expedient for the court to assume jurisdiction in proceedings which contain a distinct foreign element; for instance, where one or both of the parties are domiciled in a foreign country or are foreign nationals. In deciding whether it should then assume jurisdiction, the court must follow the set of rules forming the private international law of that country.

773. Having determined that it has jurisdiction in proceedings in which there is a foreign element, the court must then look to the rules of private international law which regulate the choice of the law to be applied for the determination of the issues between the parties. There is general recognition of the principle that questions affecting the personal status of an individual, such as his capacity to enter into a marriage and his right to have that marriage terminated, ought to be governed by his personal law, that is to say, the law of the country with which he is most intimately connected. This principle is not invariably carried out since, for reasons of public policy, the rules governing the choice of law may call for the court to apply its own domestic law either exclusively or together with the personal law of the parties. Moreover, there is a cleavage of world opinion on how the personal law should be determined. In most European countries it is considered that a man's personal law is the law of the country of his nationality; in the Commonwealth and in the United States of America, it is the law of the country, province, or state in which he is domiciled.

774. The private international law of a country also governs the extent to which recognition is given in that country to the exercise of jurisdiction by the courts of another country. The question of recognition may arise in proceedings for divorce, nullity of marriage or other matrimonial relief. Thus, in proceedings for divorce, the defence of a respondent spouse may be that the parties have already been divorced in another country, whereupon the court will have to decide whether it ought to recognise the foreign decree of divorce as valid. Alternatively, the validity of a decree of divorce or nullity of marriage may be the only question to be decided, as, for instance, when a person wishes to marry again in a country other than that in which he has obtained a divorce. In such a case the law may contain a general principle from which it will be a simple matter to determine the validity of the decree, or it may be necessary in doubtful cases for the court to be asked to make a declaration or, where there is a conflict between the parties, for the issue to be tried by the court.

775. The grounds of divorce, and to a lesser extent the grounds which render a marriage void or voidable, and the basis upon which divorce or nullity jurisdiction is exercised, vary from country to country. (The factors determining whether the court has jurisdiction are usually the domicile, or the nationality, or the residence, of both, or even of one, of the parties, or any combination of these factors.) It follows that recognition may not always be given in one country to the exercise of jurisdiction by the court in another country. This situation may result in hardship to the individual who moves his home from one country to another.

The tenor of the evidence

776. The basis upon which the court in England exercises divorce and nullity jurisdiction was criticised on the following grounds:

- (i) that sometimes hardship is caused by a person being unable to apply for relief in England,
- (ii) that the basis of nullity jurisdiction is complicated and uncertain, and
- (iii) that in certain respects jurisdiction is exercised in such a way as to exclude the recognition of English decrees in other countries.

Witnesses also objected to the rule that throughout the marriage a wife's domicile is dependent on that of her husband. The basis for the recognition in England of decrees granted in other countries was also criticised.

777. Very little evidence on these matters was submitted by the Scottish witnesses. However, the law of Scotland in this respect is very much the same as that of England and is therefore open to the same criticisms as have been made of English law.

The Commission's views

778. For the most part, we accept these criticisms and we are proposing alterations in (i) the basis of jurisdiction and (ii) the basis of recognition. Our recommendations are designed to relieve certain cases of hardship, to make the law clearly ascertainable and to give impetus to the promotion of a greater measure of international recognition for decrees of divorce and nullity of marriage.

779. In the paragraphs which follow we deal in detail with the rules relating to jurisdiction and recognition, first in respect of divorce, then in respect of nullity of marriage. In our consideration of this subject, we found it most helpful to put our recommendations in the form of a code. We think that this code effectively presents the recommendations as a whole and we have accordingly reproduced it in Appendix IV in place of the usual summary of recommendations at the end of the Report.

DIVORCE

THE PRESENT POSITION

Jurisdiction in England

780. Apart from certain recent statutory exceptions (see paragraph 782), the basis in England upon which jurisdiction to entertain divorce proceedings is founded is domicile. The court will entertain proceedings only if both husband and wife are domiciled in England at the time of the proceedings and will refuse jurisdiction in all other circumstances. This rule was finally laid down in the case of *Le Mesurier*¹.

¹ *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.

781. It is a principle of English law that on marriage the wife automatically acquires the domicile of her husband and until the marriage ends she cannot in any circumstances acquire a domicile separate from that of her husband.

782. A strict adherence to the principle of domicile as the sole basis of jurisdiction had led in certain instances to grave hardship for which the legislature has provided a remedy. The following statutory exceptions have been made:

- (i) By Section 18 (1) (a) of the Matrimonial Causes Act, 1950, the court has jurisdiction to entertain proceedings by a wife for divorce, notwithstanding that her husband is not domiciled in England, if she has been deserted by him, or if he has been deported from the United Kingdom, provided that he was domiciled in England immediately before the desertion or deportation. This exception was first introduced by the Matrimonial Causes Act, 1937.
- (ii) By Section 18 (1) (b) of the Matrimonial Causes Act, 1950, the court has jurisdiction to entertain proceedings by a wife for divorce, notwithstanding that her husband is not domiciled in England, if she is resident in England and has resided there for a period of three years immediately preceding the commencement of the proceedings, provided that her husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. This exception was first introduced by the Law Reform (Miscellaneous Provisions) Act, 1949.
- (iii) By Section 18 (2) of the Matrimonial Causes Act, 1950, the court has jurisdiction to entertain proceedings by a wife for presumption of death and dissolution of marriage if she is resident in England and has resided there for a period of three years immediately preceding the commencement of the proceedings. This exception was first introduced in statutory form by the Law Reform (Miscellaneous Provisions) Act, 1949².

Another exception was made by Section 1 of the Matrimonial Causes (War Marriages) Act, 1944, with the object of protecting English women who married members of the armed forces of other countries during their stay in England at the time of the Second World War³.

Jurisdiction in Scotland

783. Jurisdiction in respect of actions for divorce raised in Scotland is based upon domicile, since the Scottish court has followed the rule in the case of *Le Mesurier*. In Scotland as in England a wife is unable to acquire a domicile separate from that of her husband.

784. Exceptions to the rule exist as follows:

- (i) The court has jurisdiction to entertain an action of divorce by a wife on the ground of desertion if her husband was domiciled in Scotland at the time of leaving her. This exception is founded on the principle that, after a cause of action has arisen, a husband is not entitled, by changing his domicile, to subject his wife to the jurisdiction of the court of another country⁴. There is no clear authority

² Before that Act, it had been held, in *Wall v. Wall*, [1950] P. 112, that the court had jurisdiction to entertain such proceedings at the suit of either the husband or the wife if the petitioner was resident in England. Now, except as mentioned, the petitioner must be domiciled in England.

³ Proceedings had to be started before 1st June, 1955.

⁴ See *Lack v. Lack*, 1926 S.L.T. 656.

for the application of this principle where the cause of action is adultery or cruelty committed in Scotland while the husband was domiciled there⁵.

- (ii) Section 2 of the Law Reform (Miscellaneous Provisions) Act, 1949, makes the same provision for Scotland as that made for England by Sections 18 (1) (b) and 18 (2) of the Matrimonial Causes Act, 1950⁶.

The Matrimonial Causes (War Marriages) Act, 1944, also extended to Scotland.

Choice of law : England and Scotland

785. In divorce proceedings the court invariably applies English or Scots law, as the case may be, to determine the issues before it. Even where the court assumes jurisdiction on a basis other than that of domicile no regard is paid to the personal law of the parties, the issues being determined as if both parties were domiciled in England or Scotland.

Recognition of foreign decrees of divorce : England and Scotland

786. The broad general principle adopted by English and Scots law is that recognition will be given to a decree of divorce obtained in another country only if the husband and the wife were domiciled in that country at the commencement of the proceedings. It is immaterial that the ground upon which the decree was given is not a ground of divorce in England or Scotland. The following exceptions exist:

- (i) A decree of divorce obtained in a country other than that in which the parties were domiciled will receive recognition if it would be accepted as valid by the court of the country in which the parties were domiciled at the time of the proceedings (the rule in *Armitage*⁷).
- (ii) The Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926-1950, confer powers on the courts of countries within the Commonwealth to which the Acts have been applied by Order in Council, to grant decrees of divorce on grounds which are grounds for divorce in England, where the parties are British subjects domiciled in England or Scotland, the petitioner resides in the country in which the proceedings are taken and the place where the parties last resided together was in that country. The Acts further allow such divorce decrees to be registered in England or Scotland, whereupon they are given full recognition in England or in Scotland as the case may be.
- (iii) The Matrimonial Causes (War Marriages) Act, 1944, provides that the English and Scottish courts are to recognise any decree or order made by virtue of the Act or by virtue of any law of Her Majesty's dominions outside the United Kingdom, or of any British protected state, which has been declared by Order in Council to be a law substantially corresponding to the provision made in respect of Great Britain by the Act, provided that reciprocity of treatment is granted to English or Scottish decrees.

⁵ See, however, *Crabtree v. Crabtree*, 1929 S.L.T. 675.

⁶ Before that Act, it would seem that the court would exercise jurisdiction in proceedings for presumption of death and dissolution of marriage only if the parties were domiciled in Scotland; see *Antanina Anskaitis or Labacianskas-Petitioner*, 1949 S.L.T. 199.

⁷ *Armitage v. Att. Gen.*, [1906] P. 135.

787. The English court will also recognise decrees pronounced by the courts of other countries in the exercise of a jurisdiction similar to that given to the court in England by Section 18 of the Matrimonial Causes Act, 1950⁸. In his judgment in the case of *Travers*, Hodson L.J. said:

“ . . . where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves.”

It would appear, however, that, if jurisdiction has been based on the residence of the wife, the period of residence must be at least the period (three years) which would confer jurisdiction on the English court under the provisions of Section 18 (1) (b) of the Act of 1950⁹.

788. The position in Scotland may at present be different. In the case of *Warden*¹⁰, the view was expressed that, since the legislature had not expressly made provision in the Law Reform (Miscellaneous Provisions) Act, 1949, for the court to act reciprocally, it had no power to do so in face of the general principle that the domicile of the parties alone confers jurisdiction. On that basis the anomalous position would result that a decree granted in England, in the exercise of the jurisdiction conferred by Section 18 of the Matrimonial Causes Act, 1950, would not be recognised in Scotland.

CRITICISMS OF THE PRESENT LAW

“Limping marriages”

789. The most pressing problem revealed by the evidence is the hardship occasioned by a “limping marriage”, that is to say, a marriage which is regarded in one country as dissolved but in another country as still in being. Not only does this situation cause serious difficulties for the parties to the marriage who, if they enter into a later marriage, may render themselves liable to criminal proceedings for bigamy in a country which does not recognise the validity of their divorce, but it may also have grave consequences for the children of the later marriage, who will be regarded as illegitimate in that country.

790. It was said that “limping marriages” arise:

- (i) Because the English and Scottish courts will recognise only in certain limited circumstances a decree of divorce granted by the court of another country in the exercise of a jurisdiction based on nationality or residence. In most European countries the personal law of an individual is determined by his nationality and a national of such a country can obtain a divorce in that country irrespective of where he is domiciled. Thus a French national domiciled in England can obtain a decree of divorce in France, but the decree will not be recognised in England.
- (ii) Because neither English nor Scots law allows a wife to acquire a domicile separate from that of her husband. In the United States of America (and in certain other countries) it is accepted that a wife may acquire a separate domicile and may obtain a divorce from the court of the State in which she is domiciled, which will be recognised in all the other States. If the husband is domiciled in

⁸ *Travers v. Holley and Holley*, [1953] P. 246; *Carr v. Carr*, [1955] 1 W.L.R. 422. In these two cases a decree had been granted in the exercise of a jurisdiction similar to that conferred on the English court by Section 18 (1) (a) of the Matrimonial Causes Act, 1950.

⁹ *Dunne v. Saban*, [1954] 3 All E.R. 586.

¹⁰ *Warden v. Warden*, 1951 S.L.T. 406.

another State of the United States of America, the English and Scottish courts may recognise the validity of a decree obtained by the wife in these circumstances by virtue of the rule in *Armitage*, but they will certainly not do so if the husband is domiciled in a country, such as England or Scotland, where the right of a wife to a separate domicile is not accepted.

- (iii) Because it is more difficult under English and Scots law to acquire a new domicile than it is under the law in most European countries and in the United States of America (see also paragraphs 792–793). For instance, a person with an English domicile of origin and living in Norway may be regarded by the Norwegian court as being domiciled in Norway and by the English court as being domiciled in England. In such a case, whether he obtains a divorce in Norway or England, he will be treated in the other country as still married.
- (iv) Because, when they exercise their statutory jurisdiction on a basis other than that of domicile, the English and Scottish courts do not take into account the personal law of the parties. Thus, a Frenchwoman resident in England may obtain a decree of divorce from the English court on the ground of insanity (by virtue of the jurisdiction conferred by Section 18 (1) (b) of the Matrimonial Causes Act, 1950) but the English decree would not be recognised in France since insanity is not a ground of divorce in that country.

The basis of jurisdiction

791. The basis on which divorce jurisdiction is at present exercised was also criticised. The major criticism was that the jurisdiction is too restricted, because of the excessive emphasis placed by English and Scots law on the factor of domicile. It was said that hardship also results from the strict view taken of the concept of domicile. On the other hand, it was suggested by several witnesses that in some respects the basis of jurisdiction is too wide. We deal with these questions under the three heads of domicile, residence and nationality.

Domicile

792. We have already referred to the fact that the English and Scottish concept of domicile differs from that current in many other countries. Under English and Scots law, every person at birth acquires a domicile of origin. This is the domicile of the father; if the child is illegitimate or is born after the death of its father, it is the domicile of the mother. In addition, a person of full age (and, in Scotland, a minor), except a married woman, may acquire an independent domicile of choice. To acquire a domicile of choice it must be shown that the person has not only established a residence in the new country but that he also intends to remain there permanently. It is the existence of this intention which distinguishes domicile under English and Scots law from mere residence. A person's domicile of origin remains suspended while he has a different domicile of choice, but revives if he abandons the latter without acquiring a fresh domicile of choice.

793. The concept of domicile derives from Roman law. It has been well described by Savigny, as follows:

“That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode, and thus for the centre at once of his legal relations and his business. The term *permanent* abode, however,

excludes neither a temporary absence nor a future change, the reservation of which faculty is plainly implied; it is only meant that the intention of mere transitory residence must not at present exist.”¹¹

This view of domicile still prevails in Europe and in the United States of America, where domicile is regarded as equivalent to home in the popular sense or, as European lawyers express it, to the place where a man has his habitual or principal residence. It prevailed in England until comparatively recent times. Thus, a little short of a hundred years ago domicile (of choice) was defined by an English judge, as follows:

“That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.”¹²

In the last fifty years, however, the House of Lords has insisted that the word “permanent” must be interpreted in a more literal sense¹³. The intention of the resident must be examined in the greatest detail, and if the evidence shows that he contemplates some event, however uncertain or problematical it may be, on the occurrence of which he will leave the country in which he has long resided, then he will be held to have lacked the intention necessary for acquiring a domicile of choice in that country. In the result, a person who has perhaps spent most of his married life in England may be unable to obtain matrimonial relief unless he is prepared to undergo the trouble and inconvenience of taking proceedings in the country in which English law regards him as being still domiciled. Moreover, it may well be that the court of that country would repudiate jurisdiction because it would regard him as having acquired an English domicile by reason of his long residence in England.

Residence

794. Residence is a basis of divorce jurisdiction only to the limited extent provided by Section 18 (1) (b) of the Matrimonial Causes Act, 1950, and, in respect of Scotland, by Section 2 of the Law Reform (Miscellaneous Provisions) Act, 1949. On the one hand, it was said that this provision is unsatisfactory because relief is available for a wife but not for a husband¹⁴. On the other hand, it was said that the court has been given too wide a jurisdiction, because relief is provided not only for an Englishwoman or Scotswoman but also for a woman who is a national of another country,

¹¹ Savigny, *A Treatise on the Conflict of Laws*, translated by William Guthrie (1869), at p. 54.

¹² Kindersley V.C. in *Lord v. Colvin* (1859), 4 Drew. 366, 376.

¹³ In *Winans v. Att. Gen.*, [1904] A.C. 287, an American who had resided abroad and principally in England for the last thirty-seven years of his life was held to have died domiciled in Maryland, where he had lived with his father before coming to Europe, since throughout his life he had an expectation or hope of returning home were he able to acquire certain property in Baltimore. In *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588, a Scotsman who came to England with the express purpose of living on the bounty of his brothers and sisters and who resided there for the last thirty-six years of his life was held to have died domiciled in Scotland, since presumably he would have returned to Glasgow had the family gone back there.

¹⁴ It seems clear from the reports of the various debates on the Law Reform (Miscellaneous Provisions) Bill, 1949, that the legislature had chiefly in mind the need to provide relief for the Englishwoman or Scotswoman who, having married a man who was domiciled in and a national of another country, is subsequently deserted by him. As the law stood before 1949, a wife in those circumstances had no remedy save in the court of her husband's country (except for the limited relief provided by the Matrimonial Causes (War Marriages) Act, 1944).

provided that she resides in England or Scotland for the requisite period of three years. This may be so even if the wife has deliberately come to England or Scotland for the purpose of obtaining a divorce which she cannot obtain in her own or her husband's country.

Nationality

795. Nationality has never been a basis of divorce jurisdiction in England or Scotland. One consequence is that an Englishman or a Scotsman who is domiciled in some other country may not be able to obtain a divorce; for instance, if he is domiciled in Italy, where divorce is not allowed.

The wife's separate domicile

796. The dependency of the wife's domicile on that of her husband had its origin in the common law subjection of the wife to her husband. The rule was criticised strongly by many of the witnesses on one or other of three main grounds. The chief objection was based on a question of principle; it was said that it is illogical and not in keeping with the spirit of the age that this relic of the wife's subservience to her husband should be retained. Secondly, it was said that the rule gives rise to "limping marriages" (see paragraph 790 (ii)). Thirdly, it was said that the rule results in hardship to wives in as much as matrimonial relief may be considerably delayed or even denied. This may happen in the case of an Englishwoman married to a man who has at all material times been domiciled in another country. She must take up residence for at least three years in England before the court is able to assume jurisdiction; but she may be unable to do so for financial or other reasons; moreover, there may be difficulty in preserving the evidence for the divorce proceedings during the time necessary to establish a residential qualification.

PROPOSALS OF THE WITNESSES

The basis of recognition

797. The difficulty of this question is demonstrated by the fact that no two witnesses were exactly agreed on a solution. There was general endorsement of the principle that the English court should at least recognise the competence of a court of another country to grant a decree of divorce in the exercise of a jurisdiction similar to that which the English court itself exercises, no matter upon what basis this latter jurisdiction is founded. The witnesses differed, however, on the extent to which the jurisdiction of the English court should be widened, if at all (see paragraphs 800-803).

798. A number of witnesses considered that in addition to reciprocity of treatment, recognition should be given in certain circumstances to divorce decrees notwithstanding that jurisdiction has been exercised on a basis which is not accepted in England. Some proposed that recognition should be given to decrees granted by the court of the country of which the parties were nationals at the time of the proceedings. (There was a divergence of view, however, on the course to be followed if husband and wife were of different nationalities.) Other witnesses suggested that a divorce decree granted in accordance with the personal law of the parties should receive recognition, whether or not the proceedings were taken in the country of which the husband and wife were nationals or in which they were domiciled. Others again were of the opinion that the English court should recognise a divorce decree if the grounds upon which it was granted are substantially similar to the grounds for divorce in England.

799. It was recognised that the problem of "limping marriages" cannot be completely solved merely by an alteration of English law. An alteration on any of the lines suggested above may well decrease their number, but there will still remain the problem caused by the failure of the courts of other countries to recognise a decree of divorce pronounced by the English court. With this point particularly in mind, two witnesses suggested that reciprocity of treatment could be obtained by the introduction of an international Convention for the recognition and registration of decrees of divorce (and nullity of marriage) by the courts of those countries which have subscribed to it.

The basis of jurisdiction

800. There was a similar divergence of opinion as to the basis upon which the English court should exercise divorce jurisdiction.

801. On the one hand, it was suggested that there should be a return to the position when domicile was the sole basis of divorce jurisdiction. This would mean the abolition of the present statutory exceptions designed to prevent hardship to wives whose husbands are not domiciled in England, but the witnesses contemplated that this difficulty would be met by allowing the wife to have a separate domicile (see paragraphs 804-806).

802. On the other hand, a number of witnesses were in favour of an extension of the court's jurisdiction. The proposals took three forms. First, it was suggested that residence should be a basis of jurisdiction for proceedings by husband and wife alike. (The witnesses differed, however, on whether English law alone should be applied by the court in determining the issues or whether the ground upon which the divorce is sought must also be a ground under the personal law of the parties.) Secondly, it was suggested that the court should exercise jurisdiction in respect of divorce proceedings brought by citizens of the United Kingdom and Colonies, if they are domiciled in a country which does not form part of the United Kingdom and Colonies or, alternatively, if they are domiciled in a country the law of which does not permit divorce. Thirdly, it was suggested that the jurisdiction of the court should be unlimited. One proposal on these lines was that the court of each country should be free to pronounce a decree of divorce in respect of any party who chooses to submit to its decision, which should then have validity only within the territorial limits of that country. To avoid the creation of "limping marriages", the question of recognition would be dealt with either under a convention or by each country recognising a divorce decree granted in another country on a ground which would have entitled the petitioner to a divorce in the country in which recognition is sought. Another proposal was that, except where the petitioner is domiciled in England (when English law would be applied), the court should not grant a decree unless the personal law of the parties recognises as sufficient ground of divorce a ground substantially similar to that on which divorce is sought in England.

803. Several witnesses remarked on the difficulties caused by the difference between the English and Scottish concept of domicile and that followed in other countries. They made no specific proposals beyond emphasising the desirability of closing the gap between the two views.

The wife's separate domicile

804. Most of the witnesses considered that a wife should be allowed to have a separate domicile from that of her husband. The proposals took two forms, namely:

- (i) that the fact of marriage should not in any way affect the wife's right to choose her domicile, and

- (ii) that for the purpose of taking matrimonial proceedings the wife should be entitled to claim a domicile separate from that of her husband.

805. In form (i), the proposal was supported by most of the women's organisations which submitted evidence on this subject and by several other witnesses. It would affect not only the wife's right to take matrimonial proceedings but also, for instance, her liability for income tax and the right of succession to, and the liability for death duties on, her estate after her death. It was said that there can be no justification at the present time for the retention of any rule of law which denies a wife equality with her husband. A recent change in the law has allowed a wife to be independent of her husband in respect of nationality and independence of domicile should logically follow independence of nationality. While husband and wife live together their domicile would usually be the same, as it would depend on the situation of their permanent home, but on their separating on the break-up of the marriage, each would be free to acquire another domicile.

806. Form (ii) was supported by several witnesses who disliked the exceptional statutory jurisdiction based on residence and suggested that the cases of hardship which are at present met by that jurisdiction should be met instead by allowing a wife to claim a separate domicile. These witnesses considered, however, that to allow her to have a separate domicile for all purposes might give rise to difficulties.

The Denning Committee

807. The Denning Committee considered the basis of jurisdiction and the basis of recognition, in relation to England, and made certain recommendations¹⁵. It proposed, in the first place, that

“When a wife has been deserted by her husband and she was, immediately before the marriage or immediately before the desertion, domiciled in [England], the High Court should have jurisdiction in and in relation to proceedings for divorce as if both parties were at the material times domiciled [in England].”

It then suggested that the validity of any decree made in any part of the Commonwealth (or other prescribed country) under a law substantially corresponding to this proposed jurisdiction in England should be granted recognition in England.

808. Secondly, the Committee proposed that

“When a husband and wife are resident in [England] the High Court should have jurisdiction to grant a decree of divorce or nullity as if both parties were at the material time domiciled [in England] provided that the law of the place where the parties are domiciled recognises as sufficient cause for a decree of divorce or nullity the same cause as that for which it is sought [in England].”

As a corollary, it then suggested that

“A decree of divorce or nullity granted to parties by a Court of the country where they are resident for a cause recognised by the law of that country should be recognised as valid [in England] provided that the cause for which the decree was granted is recognised by the law of the place where they were domiciled as sufficient cause for such a decree.”

¹⁵ Cmd. 7024, paragraphs 82–83, Final Report.

809. Since the Committee's Report was presented, the law has been amended so as to give partial effect to these recommendations (see paragraph 782 (ii)), but the proposal that the personal law of the spouses should be applied when jurisdiction on the basis of residence is claimed, has not been implemented.

RECOMMENDATIONS OF THE COMMISSION

Summary

810. We consider that the time has come for a comprehensive set of rules to be framed in a Statute, which will set out clearly:

- (i) the circumstances in which the English and Scottish courts will have jurisdiction in divorce proceedings¹⁶;
- (ii) the law which should be applied for a proper determination of the issues in such proceedings; and
- (iii) the circumstances in which recognition will be granted in England and Scotland to pronouncements of divorce in other countries.

Our views on the nature of these rules are summarised in the next two paragraphs.

811. We consider that domicile should continue to be the main basis, but not the sole basis, upon which divorce jurisdiction is exercised by the English and Scottish courts. We think that there should be some relaxation in the strict requirements of the law as to domicile in order to bring it more into line with the concept which obtains in other countries. We are not prepared entirely to admit the possibility of husband and wife having separate domicils; instead, we are recommending that, in place of the present exceptions to the rule that domicile is the sole basis of jurisdiction, a wife should be allowed to claim a separate English or Scottish domicile for the purpose of bringing divorce proceedings. In addition, we are recommending that the English and Scottish courts should be allowed to grant a decree of divorce in the exercise of a jurisdiction based on a simple residence qualification, provided that the circumstances are such that, in addition to there being sufficient grounds under English or Scots law, as the case may be, the applicant would be entitled to have his marriage terminated under his personal law, whether this be the law of the country in which he is domiciled or of that of which he is a national. The introduction of this jurisdiction based on residence would in our view greatly assist those persons who have to live in England or Scotland for some time but who have no intention of becoming domiciled therein. We are also recommending that in certain circumstances of hardship jurisdiction should be based on citizenship of the United Kingdom and Colonies.

812. We take the view that a greater measure of recognition should be given to the exercise of jurisdiction in other countries. Only in this way can a start be made towards lessening the number of "limping marriages" and a lead be given to other countries which may result in a corresponding recognition of the validity of English and Scottish divorce decrees. We are recommending, therefore, that in England and Scotland recognition should be given to the validity of a divorce (i) which has been obtained by a spouse under the law of either (a) the country in which both spouses were domiciled, or in which one spouse was domiciled, or (b) the country of which both spouses were nationals, or of which one spouse was a national,

¹⁶ The basis on which the court exercises jurisdiction in proceedings for judicial separation or for restitution of conjugal rights in England or adherence in Scotland was not criticised by the witnesses. In our opinion, however, for the avoidance of doubt this jurisdiction should also be defined by statute.

or (ii) which would be accorded recognition by the law of such country. Furthermore, we are proposing that recognition should be given to a divorce obtained in the exercise of a jurisdiction which is not based on the domicile or the nationality of the spouses but which is substantially similar to that which is to be exercised by the English and Scottish courts, for instance a jurisdiction based on residence. We do not exclude the possibility of setting up an international Convention for the recognition of divorce decrees.

813. We set out our detailed proposals in the paragraphs following.

The basis of jurisdiction

814. We consider it desirable that the provision of facilities for obtaining a divorce should be limited to persons who are in some way connected with England or Scotland, as the case may be. We doubt whether any large measure of recognition would be given by other countries to the exercise of a jurisdiction in divorce based on any other principle. Thus, for the courts to pronounce a decree of divorce intended to have a strictly limited territorial validity (see paragraph 802) would introduce a considerable element of doubt as to their status for those persons who at the time of the proceedings are connected with some other country or countries by domicile, nationality or residence, or who become so connected at a later date. This objection would apply, in our view, even if the court were to look to the parties' personal law in the exercise of such a jurisdiction (see paragraph 802). The number of "limping marriages" would, therefore, be increased rather than the reverse. It might be said that the objection would not hold if there were an international Convention for the recognition of divorce decrees granted on such a basis. Previous attempts to obtain support for international Conventions lead us to believe, however, that it would take a considerable time for a sufficient number of countries to be induced to ratify the Convention and thus to make such a scheme operable.

Domicil

815. We recommend that domicile should continue to be the main basis of the court's jurisdiction. There are, however, two questions which have to be considered: first, whether a change should be made in the English and Scottish concept of domicile and, secondly, whether a wife should be entitled to acquire a separate domicile. In view of the limitations imposed by our terms of reference, we have confined our consideration of these questions to the influence of domicile on a person's marital status and, in particular, to its impact upon the applicant's right to obtain in the country of his or her residence a decree which will command international validity. We appreciate, of course, that domicile is equally important for the determination of other rights and obligations. We have been considerably helped by the fact that a Standing Committee on Private International Law, set up by the Lord Chancellor in September, 1952, was asked to consider, and reported on¹⁷, the question whether any amendments were desirable in the law relating to domicile, in view especially of the decisions in *Winans v. Attorney-General* and *Ramsay v. Liverpool Royal Infirmary*¹⁸.

The concept of domicile

816. The Standing Committee rejected a suggestion that domicile in English and Scots law should be made equivalent to habitual residence, as is the position in most European countries. As the Committee said, such a change would make no allowance for the Englishman or Scotsman who takes up

¹⁷ Cmd. 9068.

¹⁸ See paragraph 793 and footnote 13.

residence in some other country but who intends ultimately to return and has no wish during the intervening period to have his legal rights and obligations governed by a legal system other than that of the country of his birth. The majority of the Standing Committee for similar reasons was opposed to the suggestion that a person should be held to have acquired a domicile in a country if he intends to live in that country for an indefinite period. The majority favoured the retention of the present rule that domicile should consist of residence in a country accompanied by an intention to live in that country permanently. However, to assist in the determination of a person's domicile, the majority recommended the adoption of certain presumptions designed to facilitate proof of the necessary intention. The most important of these presumptions is that where a person has his home in a country, he should be presumed to intend to live there permanently. The presumption is to be rebuttable, but it was said that the practical effect of the proposal will be that in cases which go to trial the burden of proof will be placed upon the person who seeks to show that the domicile of origin has not been abandoned for a domicile of choice. The minority view in the Standing Committee was that it is necessary to lay more emphasis on residence in a country and, in consequence, that a person should be deemed to acquire "a new domicile in the country in which he voluntarily establishes his home, if he does so, not for a mere special and temporary purpose, but with a present intention of living there for an unlimited time". This rule would be supported by the presumption that, "Where a person has his home in a country and no home in any other country, his intention to live there for an unlimited time shall be presumed, unless it is proved that he has a definite intention of ceasing to live there upon the occurrence of some specified event in the future that will happen in the normal course of things".

817. The Standing Committee also recommended that a domicile, whether of origin or choice, should continue until another domicile is acquired. This would mean the abolition of the doctrine of the revival of a domicile of origin (see paragraph 792).

818. We have considered this matter very carefully, in the light of the Standing Committee's Report. At first we were inclined to favour the minority suggestion, since that seemed to provide a clear solution for the difficulties which may arise when the acquisition of a domicile is tested by English or Scots law in the course of matrimonial proceedings. The difference between the majority and minority views is, however, a fundamental one of principle. The present law, which was accepted by the majority, is based on the idea that a person who leaves his country of origin and takes up residence in another country should be able to claim that his personal status should continue to be governed by the law of the country of his origin because he has some intention of returning there. The minority view rested on a quite different principle, namely, that a person who chooses to sever his connection with the country of his origin to the extent that he takes up residence in another country for an indefinite period, should be held to have lost his domicile of origin and to have acquired a domicile of choice in the country of his residence, unless he has a firm intention of returning to the country of his origin on the fulfilment of the specific object which has caused him to live in another country. Acceptance of this latter principle would have far-reaching social consequences, since it would mean that many Englishmen and Scotsmen would have to forfeit their English or Scottish domicile of origin and submit to their personal rights and obligations being regulated by the law of the country in which they were resident. Although we were prevented by our terms of reference from giving the matter the

full examination which it merits, we have concluded that it would be going too far to make this change. We therefore accept the suggestions of the majority in the Standing Committee, which we think represent an improvement on the existing law, and we are content to endorse their recommendations as they stand (see paragraphs 816 and 817).

The wife's separate domicile

819. The Standing Committee on Private International Law also considered the question whether married women should be able to acquire a separate domicile, a subject which the Committee recognised involved questions of social policy many of which fell within the terms of reference of this Royal Commission. The Committee concluded that on balance it would be undesirable to recommend any alteration in the law in this respect, except that it considered that a married woman who had been separated from her husband by order of a court of competent jurisdiction should be able to acquire a separate domicile.

820. It will be plain from other parts of our Report that as a rule we favour changes in the law which will place husband and wife on the same footing. However, there are certain objections to allowing a husband and wife to have separate domicils. In the first place, however much of an anachronism the theory of the unity of husband and wife may be, it is none the less true that there is and must be unity of marriage. This is implicit in the very definition of a marriage as the voluntary union of one man and one woman to the exclusion of all others. Domicil is equivalent to permanent home and to say that a husband and wife are at liberty to acquire and retain separate permanent homes seems to us entirely inconsistent with a life-long union and indeed with the duty of one spouse to cohabit with the other spouse. Moreover, there is the practical objection that to have two laws regulating the mutual rights and obligations of husband and wife would introduce uncertainty in a matter where certainty is essential. It is said that under the doctrine of unity of domicile the wife may suffer hardship, since the husband may capriciously impose a new domicile on her and thus subject the marriage to a matrimonial law that is distasteful to her and at variance with her reasonable expectations. But to allow the wife to acquire a separate domicile would only add to the difficulties; the husband's rights would then become subject, in certain respects, to the law of his wife's new domicile; at the same time, the husband would still be free to exercise rights against his wife based on the law of his domicile.

821. We consider, therefore, that husband and wife should continue to share a common domicile. There is then the question how that domicile is to be determined. It is preferable to have a simple rule without exception and we can see no reason why the law should not be left as it is, namely, that upon marriage the wife's domicile should become that of her husband.

822. In the past, however, hardship has arisen for a wife, resident but not domiciled in England or Scotland, as the case may be, because the court would exercise jurisdiction only on the basis of domicile. On the breakdown of the marriage the husband may have left England and subsequently changed his domicile; or, if husband and wife were at the time living in another country, the wife may have returned to England where her family and former friends are living. It may then be difficult, and sometimes impossible, for her to take divorce proceedings in the country in which she and her husband are domiciled or of which he is a national. It is these cases for which relief is at present provided in England by Section 18 of the Matrimonial Causes Act, 1950. To a large extent relief is also provided in Scotland. In the exercise of jurisdiction, however, the court pays no regard to the personal law of the

spouses and it is unlikely that the divorce will be recognised in other countries. We consider that it is still necessary to provide relief for this form of hardship and an alternative method would be to allow a wife to claim a domicile separate from that of her husband for the purpose of bringing matrimonial proceedings.

823. It is useful to see how the problem has been met in other countries, since this has a bearing on the question of recognition. In some countries within the Commonwealth, there has been legislation on the lines of Section 18 (1) (a) of the Matrimonial Causes Act, 1950, expressly giving the court jurisdiction to entertain divorce proceedings by a wife who has been deserted by her husband if he was domiciled in the country in question immediately before the desertion, notwithstanding that he may have subsequently changed his domicile. In other countries within the Commonwealth it has been enacted that a wife is to be deemed to have retained the domicile which she had immediately before the desertion or separation which forms the basis of her petition for divorce. In addition, in New Zealand a wife who is living apart from her husband and who, if she were a single woman, would be held in the circumstances to have a New Zealand domicile, is to be deemed to have such a domicile for the purpose of bringing divorce proceedings, notwithstanding that her husband is not domiciled in New Zealand. Generally speaking, a wife has a right to acquire a separate domicile in the United States of America, but in a number of States this right is limited to a wife who by reason of her husband's cruel conduct is entitled to leave him and set up a separate residence. In some other countries the wife has an unrestricted right to a separate domicile; it will generally be found that in those countries domicile is equivalent to habitual residence and does not affect the mutual rights and obligations of married persons, these being governed by the law of the country of which the spouses are nationals.

824. It appears to us, therefore, that there would be a practical advantage if the court were to be allowed to exercise jurisdiction on the basis of the wife's separate domicile, since a decree granted on this basis is far more likely to receive recognition in those countries which now in some degree allow a wife to have a separate domicile. It remains, however, to consider how far this course conflicts with the principle of unity of marriage. In our view the objections to the acquisition of a separate domicile apply with much less force if the marriage has broken down to the extent that a spouse is prepared to take proceedings for its dissolution. It can no longer be said that unity of marriage exists; to allow a wife to claim a separate domicile in those circumstances is merely to anticipate the position that will arise, should she be successful in obtaining a decree.

825. We recommend, therefore, that a wife who is living separate and apart from her husband should be entitled to claim a separate English or Scottish domicile for the purpose of establishing the jurisdiction of the English or Scottish court to entertain divorce proceedings by her, notwithstanding that her husband is not domiciled in England or Scotland, as the case may be. The burden of proof should be on the wife to establish that the circumstances are such that, had she been a single woman, she would be held to have acquired an English or Scottish domicile. Where, however, the wife was domiciled in England or Scotland immediately before the marriage, or immediately before the separation, and is resident in England or Scotland at the commencement of the proceedings, she should be deemed to have acquired an English or Scottish domicile, unless there is evidence to the contrary.

826. Our recommendation differs from that of the Standing Committee on Private International Law (see paragraph 819) in as much as its recommendation was confined to a wife who has been separated from her husband by a court order. The recommendation, however, was that a wife should be able to acquire a separate domicile for all purposes. In our opinion, there is no reason for withholding from any wife who is leading a separate life from her husband the right to claim a separate domicile for the purpose of taking matrimonial proceedings. We contemplate that for other purposes (subject to the Standing Committee's recommendation) such a wife should retain her husband's domicile until the marriage has been finally dissolved.

Residence

827. The departure from the principle of domicile as the sole basis of divorce jurisdiction which has already taken place in English and Scots law would seem to have been prompted by the desire to relieve the hardship caused to wives who have at one time or another been domiciled in England or Scotland. This hardship is to be met under our recommendations by allowing a wife to claim a separate English or Scottish domicile. We think, however, that the court should be able to exercise divorce jurisdiction in favour of a husband or wife who satisfies certain residential conditions provided that it does so in circumstances which are favourable to the recognition of its decrees in other countries.

828. The present residential qualification is open to criticism. The major defect, in our view, is that no regard is paid to the personal law of the spouses. In consequence, it is very unlikely that a decree given under English or Scots law will be recognised in the country to which the parties belong by domicile or nationality, since it will there be regarded as an usurpation of the divorce jurisdiction of the courts of that country. Under the European doctrine of cumulation, for a divorce to be recognised as valid it must have conformed both with the personal law and with the law of the country in which the proceedings have taken place. We consider that, if the exercise of jurisdiction on the basis of residence is subject to the over-riding condition that the court must look to the personal law of the spouses as well as to English or Scots domestic law, decrees granted in this way will receive wide recognition.

829. As a rule, the court will have to be satisfied that the ground of divorce alleged would justify a decree being granted not only in England or Scotland but also in the country to which the parties belong by domicile or nationality. It may happen, however, that a spouse has a ground for obtaining a divorce under English or Scots law which is not accepted as a ground in the country in which he is domiciled or of which he is a national, and yet, at the same time, he also has a valid ground for obtaining a divorce in that country which is not accepted as a ground in England or Scotland. We think that, in those circumstances, the English and Scottish courts, on being satisfied as to the facts, should be able to grant a decree of divorce in the exercise of a jurisdiction based on residence. In no circumstances, however, should the court be free to grant a decree of divorce if there is no sufficient ground of divorce under English or Scots law.

830. Since the essence of our proposal is the application of the personal law, there seems no point in requiring a minimum period of residence before jurisdiction becomes exercisable. It is a defect of the present law, however, that in proceedings by a wife under a residential qualification, the husband may be required to come to a country with which he has had no previous connection, if he wishes to protect his marital status.

We consider, therefore, that an applicant should have to satisfy the court either that both spouses are residing in England or Scotland, as the case may be, at the time of the proceedings or that the last matrimonial home was in England or Scotland.

831. We recommend, therefore, that the courts in England and Scotland should have jurisdiction to entertain proceedings for divorce if (i) the applicant is in England or Scotland, as the case may be, at the commencement of the proceedings and the place where the spouses last resided together was England or Scotland, or (ii) the parties to the marriage are both resident in England or Scotland at the commencement of the proceedings; provided that in either case the court should not grant a divorce unless (a) the personal law or laws of both the husband and the wife recognise as sufficient ground for a divorce (or nullity of marriage) a ground substantially similar to that on which a divorce is sought in England or Scotland, or (b) the facts are such that in the circumstances a decree of divorce would be obtainable by the applicant under the personal law or laws of both the husband and the wife on some other ground. It follows that the present jurisdiction based on three years' residence in the case of a wife should be abolished.

832. It may be said that, if jurisdiction is given in the way we suggest, a husband and wife, who were domiciled in and nationals of another country, might come to England or Scotland and, after only a few days' residence, one or other could start divorce proceedings. However, since the personal law of the parties would govern their right to relief, such a manifestly undesirable proceeding would avail them nothing, unless perhaps their financial circumstances qualified them for legal aid. No doubt adequate measures could be taken to deal with this possibility, by amendment of the Regulations made under the Legal Aid and Advice Act, 1949, and the Legal Aid (Scotland) Act, 1949. We do not anticipate, therefore, that the introduction of a simple residence qualification will produce a flood of divorce applications; there would be little point in coming specially to England or Scotland in order to obtain a decree which could be given by the court of one's own country. The real purpose of introducing this basis of jurisdiction is to assist those persons who have to make a home in England or Scotland for some time, for instance by reason of their work, but who have no intention of becoming domiciled there.

833. Jurisdiction on the basis of a residence qualification is at present limited to cases where the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man. This limitation is imposed presumably in order to avoid any conflict in jurisdiction between the English or Scottish court and the courts of countries with which England and Scotland are so closely allied and which are, in addition, so near at hand that it would be no great hardship to the wife to take proceedings in the country in which her husband is domiciled. We consider, however, that if the court is to look to the personal law of the parties, no question of conflict between concurrent jurisdictions would normally arise and there is therefore no need to impose such a limitation on the proposed jurisdiction.

834. It is possible for conduct which constitutes a ground of divorce in England or Scotland to constitute a ground upon which a marriage may be annulled in another country. We suggest, therefore, that the English and Scottish courts should be able to grant a decree of divorce if the personal law of the spouses would allow the marriage to be annulled in respect of the conduct of which complaint is made.

835. In the exercise of jurisdiction based on residence it may be found occasionally that the personal law of one spouse is different from that of the other, as, for example, where husband and wife are of different nationalities, or where the wife has acquired a separate domicile. We consider that the court should then have regard to the personal laws of both husband and wife and should not pronounce a decree of divorce unless the personal laws of both recognise as sufficient ground for a divorce a ground substantially similar to that on which a decree is sought in England or Scotland, or would allow the applicant to obtain a divorce on some other ground. To do otherwise would tend, in our opinion, to increase the number of "limping marriages", rather than to diminish it.

Personal law

836. In recommending that the court should refer to the personal law or laws of husband and wife, we have not yet suggested how the relevant personal law is to be discovered. We have said that the personal law of a man is the law of the country with which he is most intimately connected and that some countries regard this as meaning the country in which he is domiciled, and others as meaning the country of which he is a national. It is important, therefore, that the court should have some working rule to guide it in choosing the law to which it must pay regard in deciding whether a divorce can be granted.

837. Since in both England and Scotland the personal law is based on domicile, we think that in the first instance the court should look to the rules of private international law of the country in which a spouse is domiciled. If that law recognises that questions of personal status are governed by the law of the country in which a person is domiciled, then the court should look no further but should regard the domestic law of that country as the personal law of the spouse. If, however, according to the law of the country in which the spouse is domiciled questions of personal status are governed by the law of the country of which a person is a national, the court should look to the rules of private international law of the country of which the spouse is a national. If the latter law regards questions of personal status as governed by the law of a person's nationality, then the court should regard the domestic law of that country as the personal law of the spouse. Provision must, however, be made for the possibility that the law of the country of which the spouse is a national regards questions of personal status as governed by the law of the country in which a person is domiciled. This introduces the difficult problem of *renvoi*, to which the courts of England and Scotland have not as yet provided an altogether satisfactory solution. We consider that in those circumstances, the domestic law of the country in which the spouse is domiciled should be regarded as the personal law of the spouse¹⁹.

838. Difficulties may arise when the court is directed to the law of the country of which the spouse is a national, because a person may have more than one nationality or may be stateless. Since the personal law is the law of that country with which a person is most intimately connected, we suggest that if a spouse has more than one nationality, his personal law should be

¹⁹ This was one of the matters considered in a wider sense by the Lord Chancellor's Standing Committee on Private International Law in connection with a Draft Convention to regulate conflicts between the law of the nationality and the law of the domicile (see Cmd. 9068). The Committee generally approved the terms of the Convention including a provision whereby, when the state where the person concerned is domiciled prescribes the application of the law of his nationality, but the state of which such person is a citizen prescribes the application of the law of his domicile, each contracting state should apply the provisions of the internal law of his domicile.

the law of the country in which he is also domiciled or, failing that, the law of the country of which he last became a national. If a spouse has no nationality, then it would be necessary to go to the law of the country in which he is domiciled, even though the court of that country would not exercise divorce jurisdiction on the basis of domicile.

839. In some countries divorce can be obtained without recourse to the court. In ascertaining the personal law of a spouse it may, therefore, be necessary for the English or Scottish court to look to some religious or legislative or executive procedure whereby divorce may be effected in the country in which the spouse is domiciled or of which he is a national.

Nationality and citizenship

840. We have also considered whether the court should be able to exercise jurisdiction in respect of an Englishman or Scotsman on the basis of his British nationality. In principle there would be no objection to this but, of course, British nationality is a status which extends to persons attached, by domicile, to a large number of countries. The British Nationality Act, 1948, and corresponding legislation in the other Commonwealth countries for the first time divided British subjects into citizens of the United Kingdom and Colonies and citizens of the other Commonwealth countries, but a citizen of the United Kingdom and Colonies may still belong, in the sense of domicile, to one of many countries, each of which will have its own law and system of courts. We are of the opinion that to allow the court an unlimited jurisdiction in divorce in respect of citizens of the United Kingdom and Colonies might lead to a great deal of confusion and might be thought to usurp the jurisdiction of the other countries with which England and Scotland are associated in this relationship.

841. We consider, however, that there is one case where the English or Scottish court should assume jurisdiction on the basis of nationality. An Englishman or a Scotsman, having grounds for divorce under the law of England or of Scotland, as the case may be, may be domiciled in a country the law of which does not permit him to take divorce proceedings. We have particularly in mind countries, such as Italy or Spain, in which a divorce will not even be granted to a national of the country. We understand that, if in such a country the law requires questions affecting the personal status of an individual to be referred to the law of the country of which he is a national, the alteration of status brought about by a divorce obtained in some other country on the basis of nationality will be recognised, provided that neither spouse is a national of the country in which recognition is sought. In a country in which divorce jurisdiction is exercised only in respect of nationals of that country the same difficulty may arise.

842. We recommend, therefore, that the courts in England and Scotland should have jurisdiction to entertain proceedings for divorce if the applicant is a citizen of the United Kingdom and Colonies and is domiciled in a country, the law of which requires questions affecting the personal status of an individual to be determined by the law of the country of which that individual is a national, and, in addition, does not grant divorce on the basis of the domicile or residence of the applicant. In such proceedings it seems to us appropriate that the issues should be determined according to English or Scots law.

843. We appreciate that this proposal may be criticised on the ground that the description "a citizen of the United Kingdom and Colonies" is quite indeterminate to associate him specifically with England, Scotland or any

other country. Thus, a person will be able to take proceedings in England or Scotland (or in any other country forming part of the United Kingdom and Colonies in which a similar rule is adopted) and can choose to come to that country the law of which best suits his case. Moreover, several concurrent jurisdictions will arise. However, if relief is to be provided for the Englishman or Scotsman in the circumstances we have described, these difficulties are unavoidable. In practice we think that the Englishman will return to England in order to obtain relief, and so on.

844. We recognise that there may be other instances where an Englishman or Scotsman is unable to obtain a divorce, for instance because he is domiciled in a country, such as the Irish Republic, the law of which does not admit divorce and requires questions affecting the personal status of an individual to be determined by the law of the country in which he is domiciled. To allow the English or Scottish court jurisdiction in those circumstances would, however, create a "limping marriage", because it is most improbable that the decree would be recognised in the country in which the applicant is domiciled. We do not think that any provision should be made for that type of case.

Presumption of death and dissolution of marriage

845. The jurisdiction of the English and Scottish courts to pronounce a dissolution of the marriage at the instance of one spouse where reasonable grounds exist for presuming the death of the other spouse, is at present based on the fact either that the applicant is domiciled in England or Scotland or that the applicant, if the wife, has been resident in England or Scotland for three years or more immediately before proceedings are begun. We consider that, as in other proceedings (see paragraph 827), residence should be a basis of jurisdiction for entertaining proceedings by both wives and husbands. The considerations which should govern the exercise of jurisdiction on this basis are, however, different.

846. Relief on this ground is in a category of its own, since the real purpose of the proceedings is to obtain a declaration that the other spouse is to be presumed to be dead. The declaration having been obtained, it follows that the marriage came to an end on the death of that spouse, whereupon the applicant became free to marry again. The dissolution of the marriage by decree of the court is an added safeguard designed to avoid the awkward situation which would arise if the presumption proves to have been wrong. The question whether a person should be presumed to be dead is principally a matter for determination by the court of the country in which the question arises, in accordance with the evidential requirements obtaining there. There is nothing to be gained by insisting that the court should look to the personal law or laws of husband and wife where proceedings are taken by a person resident in England or Scotland; indeed, it might often be difficult, if not impossible, to ascertain the personal law of the person whose death is to be presumed, at the time of his or her disappearance.

847. We recommend, therefore, that the courts in England and Scotland should have jurisdiction to pronounce a dissolution of the marriage where reasonable grounds exist for presuming the death of a spouse, not only if the applicant is domiciled in England or Scotland, as the case may be, but also if the applicant is resident in England or Scotland at the commencement of the proceedings. In any such proceedings founded on a residential qualification the issues should be determined in accordance with English or Scots law, as the case may be. It follows that the present jurisdiction based on three years' residence in the case of a wife should be abolished.

The basis of recognition

848. As we have said, we are in favour of a wide measure of recognition being given to divorces which have been obtained in other countries. We think that there should be two guiding principles. In the first place, there should be reciprocity of treatment; recognition should be given to a divorce which has been obtained in the exercise of a jurisdiction substantially similar to that exercised by the English and Scottish courts. Secondly, due regard should be paid to the personal law of the parties; recognition should therefore be given to a divorce which has been granted in accordance with, or which would be recognised by, the personal law. In some cases, both principles would apply, in others, the one or the other but not both.

Domicil

849. We recommend that in England and Scotland recognition should be given to the validity of a divorce (i) which has been obtained, whether judicially or otherwise, by a spouse in accordance with the law of the country in which both husband and wife were domiciled, or in which either the husband or the wife was domiciled, at the time of the proceedings, or (ii) which would be recognised by the law of that country.

850. Recognition would then be given in England and Scotland to:

- (i) A divorce obtained in a country under a jurisdiction based on the fact that the husband was domiciled in that country at the time of the proceedings. This is the existing law.
- (ii) A divorce obtained in a country under a jurisdiction based on the fact that the wife, but not the husband, was domiciled in that country.
- (iii) A divorce which, though not obtained by a spouse in the country in which both spouses were domiciled, or in which one spouse was domiciled, was granted in accordance with, or would be recognised as valid by, the law of that country. This will give statutory effect to the rule in *Armitage* (see paragraph 786 (i)) and will also provide for the recognition of religious divorces (see paragraph 862).

We consider that the court should not require that the concept of domicil in the country in question should exactly correspond to the English and Scottish concept, bearing in mind that in many countries domicil is equivalent to habitual residence.

Residence and citizenship

851. We recommend that recognition should also be given to a divorce obtained, whether judicially or otherwise, in circumstances substantially similar to those in which the English and Scottish courts exercise divorce jurisdiction in respect of persons who are not domiciled in England or Scotland.

852. We contemplate that under this recommendation recognition would be given in England and Scotland to:

- (i) A divorce granted on the basis of a residential qualification similar to that which we propose should give the English and Scottish courts jurisdiction in divorce (see paragraph 831). A great deal must be left to the discretion and good sense of the court which has to consider any question involving the recognition of a divorce decree

and we have therefore advisedly suggested the sufficiency of a residential requirement "substantially" similar to that proposed in respect of the jurisdiction of the English and Scottish courts. We do not think it necessary to insist that, in granting the divorce, the court or other authority should have had regard to the personal law of the spouses, so long as the divorce would in fact be recognised as valid by the personal law.

- (ii) A divorce granted in respect of a citizen of the United Kingdom and Colonies by the court of some other country forming part of the United Kingdom and Colonies, in the exercise of a jurisdiction based on citizenship to the limited degree which we propose should afford a basis of jurisdiction for the English and Scottish courts (see paragraph 842). This will allow a Scottish decree granted on this basis to be recognised in England and *vice versa*.

853. In considering whether or not a divorce has been obtained in circumstances substantially similar to those which would give jurisdiction to, say, the English court in respect of persons not domiciled in England, the question arises whether the English court should look for the purposes of comparison at (i) the law in England at the time the divorce was granted or (ii) the law in England when the question of recognition arises. The distinction becomes of importance only if the law of either country has changed in the intervening period. However, as one witness has pointed out, the problem is of particular relevance as between England and the Colonies, the law in most of which follows English law. There are two aspects to be considered: firstly, where the divorce is granted at a time when the laws of the two countries are substantially similar, and, secondly, where the divorce is granted after the English law has been changed. In our opinion each problem requires a different solution and we therefore deal with them separately.

854. The first problem may arise if the jurisdiction of the English court based on residence, as conferred by Section 18 (1) (b) of the Matrimonial Causes Act, 1950, is superseded by a jurisdiction based on residence on the lines of our recommendation (in paragraph 831). The fact that under our recommendation regard must be paid to the personal law of the spouses materially distinguishes it from Section 18 (1) (b), since, under sub-section (3) of that Section, the issues are to be wholly determined by English law. We think that if the English court were then to be called upon to compare the English law based on our recommendation with, say, a Colonial law, similar to Section 18 (1) (b) and (3), it would most probably have to find that the two laws were not substantially similar and, therefore, that a divorce obtained under the Colonial law at a time when the two laws were similar could not be recognised as valid. We are agreed that that would not be desirable. To meet such a case, we recommend that the English and Scottish courts should recognise as valid any divorce obtained in another country before the coming into operation of any statute altering the basis of divorce jurisdiction in England or Scotland, under a jurisdiction which in the opinion of the English or Scottish court was exercised under conditions and principles substantially similar to those which the English or Scottish court itself followed at the date of the divorce²⁰.

²⁰ The need to give recognition under such a provision would arise, of course, only where the divorce obtained in the other country had not been granted in accordance with, and would not be recognised by, the law of the country in which the spouses were domiciled or of which they were nationals (see paragraph 857), that is to say, where divorce jurisdiction had been exercised without recourse to the personal law of the spouses.

855. Secondly, there is the question whether recognition should be given to a divorce obtained in another country under a law similar to Section 18 (1) (b) and (3) of the Matrimonial Causes Act, 1950, after an alteration in the basis of the divorce jurisdiction of the English and Scottish courts. Subject to one exception, we can see no reason why such a divorce should be recognised if the laws of the two countries are not substantially similar. We think, however, that a partial exception should be made in respect of a divorce granted in one of the Commonwealth countries, more particularly in one of the Colonies. In our view it is desirable that a divorce obtained in one of those countries under a law substantially similar to Section 18 (1) (b) and (3) should be given recognition in England and Scotland until sufficient time has elapsed for the legislature of the country concerned to consider whether it should make a similar alteration in the basis of the divorce jurisdiction exercised by the court of that country. To afford such an opportunity we recommend that recognition should be given in England and Scotland to a divorce obtained, whether judicially or otherwise, in any other Commonwealth country within a period of three years after the coming into operation of any statute altering the basis of divorce jurisdiction in England or Scotland, under a jurisdiction exercised under the same conditions and principles as the English or Scottish court followed before the alteration in its jurisdiction took place.

Nationality

856. It must be accepted that the courts in a number of countries assume jurisdiction to grant a divorce if the husband is a national of that country, whatever his domicile may be. To refuse recognition to a divorce obtained in such circumstances is to increase the number of "limping marriages" and to cause hardship to the persons affected. To recognise such decrees is to promote a better understanding in the international sphere and possibly to secure wider recognition of English and Scottish decrees of divorce granted on the basis of domicile.

857. We recommend, therefore, that recognition should be given in England and Scotland to the validity of a divorce (i) which has been obtained, whether judicially or otherwise, by a spouse in accordance with the law of the country of which both husband and wife were nationals, or of which either the husband or the wife was a national, at the time of the proceedings, or (ii) which would be granted recognition by the law of that country.

858. We are not suggesting that the validity of a divorce obtained in the exercise of a jurisdiction based on nationality should be tested by reference to the personal law of the spouses. That law may, of course, be the law of the country of which the spouses were nationals, but, on the other hand, under the rules for the choice of law which we are recommending for adoption (see paragraph 837), it may be the law of the country in which the spouses were domiciled. Moreover, provided that the divorce is obtained in the country of which one of the spouses was a national, the fact that the court of that country may have paid no attention to the personal law of the other spouse should be irrelevant. In our opinion, it is better that recognition should be given on these lines, since, so far as we can tell, it accords with the practice of the great majority of foreign courts which assume divorce jurisdiction in respect of their own nationals. Where husband and wife had different nationalities, The Hague Convention on Divorce (1902) required the law of the last common nationality to be applied, or if they had never had a common nationality, then the laws of both nationalities. This led to awkward results, for it meant that if, for instance, a Frenchwoman married an Italian, acquired Italian nationality and then later recovered her French

nationality, she could not get a divorce in France. In consequence, the Convention was eventually repudiated by France, Belgium, Switzerland, Sweden and Germany. The prevailing practice in such countries is, therefore, for the court to apply its own domestic law exclusively in exercising divorce jurisdiction in respect of a spouse who is a national of that country and who is married to a person who is a national of another country.

859. For the English and Scottish courts to recognise decrees granted on the basis of nationality would represent a concession to the principle that nationality should determine status, but we feel that it has its jurisdiction in relieving persons who have obtained divorces on this basis from a distressing situation. Certainly, decrees recognised by the English and Scottish courts in this way would also be recognised in the many countries which have adopted nationality as a basis of divorce jurisdiction.

International agreement

860. We do not dismiss as entirely idealistic the proposal that there should be an international Convention providing for the recognition of divorce decrees obtained in the signatory countries. We think, however, that it would take a considerable time before sufficient countries could be persuaded to subscribe to such a Convention so as to make it at all workable, and it is necessary in our opinion to have a practical and working system as soon as possible. Nevertheless, the opportunity may well arise in the future for some kind of international agreement to be concluded with other countries, whereby recognition would be given by the English and Scottish courts to divorces obtained in those countries. Such an arrangement would remove any uncertainty as to the validity of a divorce which might or might not satisfy the tests proposed in our other recommendations on the basis of recognition, and would make it unnecessary to take proceedings in the English or Scottish court to determine the validity. Moreover, it might be considered appropriate in respect of certain countries that recognition should be given to divorces obtained therein, which would not be recognised as valid under our recommendations. To give effect to this proposal, it would be necessary to give general authority in a statute, the terms of which could then be applied to specific countries by Order in Council. The Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926-1950, are an example of how such a proposal could be put into effect. We suggest, however, that the extension of recognition in this manner should not be made strictly dependent on reciprocity of treatment, as it has been in those Acts.

Non-judicial divorces

861. It will be noted that we have referred in our recommendations to a divorce obtained "judicially or otherwise". In a number of countries a person may obtain a divorce without recourse to the judicial courts. Thus, a divorce may be given in accordance with the personal religious law of the husband, or it may be effected by an express act of consent by husband and wife, or it may be granted by a legislative measure or by an act of the executive.

862. The present position regarding the recognition by the English and Scottish courts of religious divorces is not clear. In the case of *R. v. Hammersmith Superintendent Registrar of Marriages*²¹ a Mohammedan, domiciled in India, was married in England to a domiciled Englishwoman

²¹ *R. v. Hammersmith Superintendent Registrar of Marriages*, ex p. *Mir-Anwarruddin*, [1917] 1 K.B. 634. This decision was followed in *Maheer v. Maheer*, [1951] P. 342.

by a marriage ceremony celebrated according to English law and he subsequently divorced her by declaration in accordance with Mohammedan law. In deciding that the Mohammedan divorce had no validity in England, the Court of Appeal gave as one reason the fact that a marriage in the Christian sense, whether celebrated by means of a religious or civil ceremony, could not be dissolved in a non-Christian manner, that is to say, by a Mohammedan divorce. Since then, the court has been asked on several occasions to decide on the validity of a Jewish divorce pronounced by the Jewish religious authorities²². The conclusion to be drawn from these decisions is that the English court will recognise the validity of a religious divorce which has been granted in accordance with, or which would be recognised as valid by, the law of the country in which husband and wife are domiciled at the time of the proceedings, provided that they had not entered into a Christian marriage; it is immaterial that the religious divorce took place in England, so long as the parties were not domiciled in England at the time. It has yet to be decided whether, in the case of an Englishwoman who, after a Christian marriage, embraces her husband's religion, where this is not Christian, the court would admit an exception to the rule and grant recognition to a religious divorce.

863. The problem which has faced the court in these cases arises from the fact that in certain circumstances the spouses may be regarded as being subject to two personal laws, one imposed on them by their religion and the other by their domicile or nationality. Where these two laws conflict, we think that the English and Scottish courts should give precedence to the law of the country in which the spouses are domiciled or of which they are nationals. We are not prepared to accept that a body in England or Scotland other than the judicial court should have jurisdiction to grant a valid divorce in respect of persons domiciled in England or Scotland, as the case may be. Our recommendations with regard to the basis of recognition are therefore designed to allow the English and Scottish courts to give recognition to a religious divorce, only provided that it has been obtained in accordance with the law of the country in which the spouses are domiciled or of which they are nationals, but irrespective of whether the husband and wife were married by a Christian or a non-Christian ceremony. We think that the sole test should be whether the law of the country with which the spouses are most closely connected allows religious divorces.

864. It may be said that this will create hardship for the Englishwoman or Scotswoman who marries, say, a Mohammedan. We do not think so. In the first place, any woman who contemplates such a marriage should bear in mind that she will be subjecting herself to the law of her husband's domicile or nationality, with all the possible consequences, such as divorce by declaration. Secondly, the wife may be able to claim a separate English or Scottish domicile (if our recommendation is given effect) for the purpose of taking divorce proceedings in England or Scotland if she has grounds for divorce (and her husband has not previously divorced her). It may be objected that a woman whose husband obtains a religious divorce from her will be unable to claim maintenance from him. Even if the court were prepared to accept jurisdiction and to make a maintenance order in her favour, we think it unlikely that the order could be effectively enforced if the husband has returned to his own country. It might at first seem a little disturbing that marriages which have been celebrated in accordance with the concepts of the Christian world should be dissolved in a manner foreign to those concepts, but, on the other hand, we feel that the marital

²² *Har-Shefi v. Har-Shefi*, [1953] 2 All E.R. 373; *Joseph v. Joseph*, [1953] 1 W.L.R. 1182; [1953] 2 All E.R. 710; *Leeser (otherwise May) v. Leeser (otherwise Bohrer)*, [1955] 2 C.L. 385.

status must be made dependent on the law of the country in which husband and wife are domiciled or of which they are nationals and, if that law gives recognition to an alteration of the marital status according to the husband's religion, the wife should be bound by it. It was said in the case of *Maher*²¹ that to recognise the validity of religious divorces would "both encourage and sanction the purely temporary union of English women and foreigners professing the Mahomedan religion during their limited residence in this country". We do not believe that the fact that a Mohammedan divorce is not recognised in England in any way deters a Mohammedan from marrying an Englishwoman and subsequently divorcing her according to Mohammedan law (a divorce which is in any event valid in Moslem countries); nor does it deter an Englishwoman from marrying a Mohammedan if she knows that she can obtain a divorce on the ground of desertion in England on the basis of a residence qualification, as in the case of *Maher*.

865. With regard to the other types of non-judicial divorce to which we have referred, we can see no reason why recognition should not be given to a divorce effected by an express act of consent if, by the personal law of the spouses, that is an accredited, and perhaps the only, means of getting a divorce. The same reasoning applies to a divorce obtained by act of the legislature or executive. If the English and Scottish courts are to look to the personal law to determine the status of the spouses, then they should not question the internal machinery by which that status is regulated by the personal law. It is probable that if the English or Scottish court were called upon now to pronounce on the validity of a divorce obtained by these means, it would follow the personal law and grant recognition, but we have thought that the matter should be placed beyond doubt by making it clear that the English and Scottish courts should in the appropriate circumstances recognise the validity of a divorce, whether or not it has been obtained by judicial process.

The Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926-1950

866. We have mentioned (in paragraph 786) that under the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926-1950, the court of any country to which the Acts have been applied is given divorce jurisdiction in respect of persons who are resident in that country and who are domiciled in England or Scotland. The exercise of the jurisdiction is made subject to certain provisos, two of which are as follows:

"(a) the grounds on which a decree for the dissolution of such a marriage may be granted by any such court shall be those on which such a decree might be granted by the High Court in England according to the law for the time being in force in England; and

(b) any such court in exercising such jurisdiction shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief;"

As a result, when proceedings are taken under the Acts in respect of parties who are domiciled in Scotland, the issues are tried in accordance with English law. This anomaly was the subject of a great deal of discussion during the passage of the Indian and Colonial Divorce Jurisdiction Bill, 1926. The chief argument for thus confining the choice of law was that in India, both on the Bench and at the Bar, there was little or no practical experience of Scots law and that it would not therefore be feasible to require the Indian courts to administer Scots law. It seems to us, however, only right that the issues should be tried in accordance with Scots law when

husband and wife are domiciled in Scotland. The Acts no longer apply to India or to Pakistan and it may well be that the objection advanced is no longer valid for the countries to which the Acts still extend. We therefore suggest that consideration should be given to the possibility of the Acts being amended to meet this point.

NULLITY OF MARRIAGE

THE PRESENT POSITION

Jurisdiction in England

867. Section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that the nullity jurisdiction vested in the High Court is to be exercised, where no special provision is contained in the Act or in rules of court, "as nearly as may be in the same manner as that in which it might have been exercised by" the Ecclesiastical Courts which had matrimonial jurisdiction before 1857. These Courts were accustomed to entertain nullity proceedings if the respondent was resident within their territorial jurisdiction or if the marriage had been celebrated in England. Jurisdiction is no longer based mainly on residence, however, but on the domicile of the parties in England (see paragraph 870) and the extent to which the court today may exercise jurisdiction on the basis followed by the Ecclesiastical Courts is not clear.

868. It would seem that jurisdiction exists when both parties are resident in England²³, whether the marriage is alleged to be void or voidable, but not when the petitioner alone is resident, but not domiciled, in England²⁴, subject to the jurisdiction now conferred by statute (see paragraph 871). There is no recorded decision on whether the High Court will assume jurisdiction when the respondent alone is resident, but not domiciled, in England.

869. There has been a number of decisions to the effect that the court has jurisdiction in respect of a void marriage which has been celebrated in England. It would seem, however, that jurisdiction on that basis cannot be assumed in respect of a voidable marriage²⁵.

870. It has become accepted that the court has jurisdiction to entertain nullity proceedings if the parties are domiciled in England at the time of the proceedings²⁶. There is one point of difference, however, between void and voidable marriages. The rule that a wife automatically acquires the domicile of her husband on marriage and cannot of her own accord change that domicile until the marriage is ended, implies the existence of a marriage. As a void marriage is regarded as a marriage which has never taken place, the "wife" in such circumstances does not automatically acquire the domicile of the "husband". If she has in fact established her permanent home with the husband, she will have acquired the same domicile, but it is not a domicile of dependency but a domicile of choice which she can change at will. However, in the case of a voidable marriage, the wife is regarded as having acquired the status of a married woman, and with it her husband's domicile; a subsequent decree of nullity granted to her by the court, although expressed to have retrospective effect to the date of the marriage, cannot alter the fact

²³ *Ramsay-Fairfax v. Ramsay-Fairfax*, [1955] 3 All E.R. 695.

²⁴ *De Reneville v. De Reneville*, [1948] P. 100; *Casey v. Casey*, [1949] P. 420.

²⁵ *Casey v. Casey*, [1949] P. 420. This decision has not been followed in Northern Ireland, see *Addison (otherwise McAllister) v. Addison*, [1955] N.I. 1.

²⁶ *Salvesen (or Von Lorang) v. Administrator of Austrian Property*, [1927] A.C. 641.

that until the date of the decree she had the status of a married woman²⁷. The court will, therefore, exercise jurisdiction in respect of a void marriage (i) if both parties are domiciled in England, or (ii) if the petitioner, whether husband or wife, is domiciled in England. Possibly the court in England would follow the decision of the Court of Session (see paragraph 872) and accept jurisdiction if the respondent is domiciled in England. In the case of a voidable marriage, jurisdiction will be exercised if the husband is domiciled in England, the wife being taken to have acquired her husband's domicil on marriage.

871. In addition, the court has been given a statutory jurisdiction to pronounce a decree of nullity of marriage²⁸ in the following circumstances :

- (i) In proceedings by the wife, notwithstanding that the husband is not domiciled in England, if she has been deserted by her husband, or if he has been deported from the United Kingdom, provided that he was domiciled in England immediately before the desertion or deportation (Section 18 (1) (a) of the Matrimonial Causes Act, 1950).
- (ii) In proceedings by the wife, notwithstanding that the husband is not domiciled in England, if she is resident in England and has resided there for a period of three years immediately before proceedings are begun, provided that her husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man (Section 18 (1) (b) of the Matrimonial Causes Act, 1950).

The Matrimonial Causes (War Marriages) Act, 1944, also applied to proceedings for nullity of marriage (see paragraph 782).

Jurisdiction in Scotland

872. The Scottish court has had no occasion in the past to draw a distinction between void and voidable marriages in deciding whether it has jurisdiction in actions for declarator of nullity of marriage. It will assume jurisdiction, whether the marriage is void or voidable, in the following circumstances :

- (i) If the parties are domiciled in Scotland.
- (ii) In proceedings by a wife under Section 2 of the Law Reform (Miscellaneous Provisions) Act, 1949, which has the same effect as Section 18 (1) (b) of the Matrimonial Causes Act, 1950.

Jurisdiction has also been exercised in respect of a void marriage when the defender alone was domiciled in Scotland²⁹. It is not finally settled whether the Scottish court can exercise jurisdiction on the ground that the marriage has been celebrated in Scotland. The Matrimonial Causes (War Marriages) Act, 1944, extended also to Scotland (see paragraph 782).

Choice of law : England and Scotland

873. English law draws a distinction between defects in the forms and ceremonies of marriage, which are governed by the law of the country in which the marriage was celebrated, and defects in the personal qualities of the parties to the marriage, which are governed by the personal law of the parties; that is to say, under English law the law of the country in which they are domiciled. In practice, however, the English court has always

²⁷ *De Reneville v. De Reneville*, [1948] P. 100.

²⁸ No distinction has been made between void and voidable marriages, but it is open to question whether the exercise of jurisdiction under Section 18 (1) (a) in respect of a void marriage is affected by the fact that the parties are not "husband" and "wife" if the marriage is indeed void (see *Rayden on Divorce*, 6th Edition, p. 39, n. (i)). Specific provision was made in the Matrimonial Causes (War Marriages) Act, 1944, for "marriage" to include a void marriage and "husband" and "wife" were to be construed accordingly (Section 5 (1)).

²⁹ *Aldridge v. Aldridge*, 1954 S.L.T. 84.

applied its own domestic law to decide issues in respect of the personal qualities of the parties whenever it has assumed jurisdiction on a basis other than domicil. Thus, in the case of *Easterbrook*⁸⁰, the parties were domiciled in Canada, but the English court pronounced a decree of nullity on the ground of the wilful refusal of the respondent to consummate the marriage, although this was not a ground recognised in any of the Canadian Provinces. The rules for the choice of law in Scotland are similar to those in England.

Recognition of foreign decrees of nullity : England and Scotland

874. A decree of nullity of marriage obtained in the country in which the parties were domiciled at the time of the proceedings will be recognised as valid by the English and Scottish courts. It is uncertain, however, whether the courts will extend recognition to a decree of nullity obtained in the exercise of a jurisdiction on some other basis. It may be that in England the court will recognise a decree pronounced in circumstances similar to those in which it will itself assume jurisdiction, but this may not be the case in Scotland (see paragraph 788). There is specific statutory provision for the recognition in England and Scotland of decrees of nullity pronounced under the Matrimonial Causes (War Marriages) Act, 1944, or similar enactments (see paragraph 786 (iii)).

CRITICISMS AND PROPOSALS

875. The criticisms of the law relating to nullity of marriage were for the most part similar to those made of the law of divorce (see paragraphs 789–796), as were also the proposals put forward by the witnesses (see paragraphs 797–806). It was also said that the law is complicated and uncertain in many respects, and should be replaced by a statutory code. Some proposals were applicable only to proceedings for nullity of marriage and are described below.

876. In suggesting that the English court should exercise jurisdiction on the basis of residence, one witness proposed that, if the marriage had been celebrated in England, residence in England by the petitioner for the three months immediately before the proceedings should give the court jurisdiction; if the marriage had been celebrated in another country, jurisdiction should not be assumed unless both parties have been resident in England for at least six months before the proceedings. His reason for allowing a shorter period than the present three years (under Section 18 (1) (b) of the Matrimonial Causes Act, 1950) was that often prompt action is necessary to adjust the position of the parties to the marriage.

877. One witness suggested that in exercising jurisdiction in respect of a void marriage the court should always determine the issues in accordance with the law of the country in which the marriage was celebrated. He considered, however, that a proviso would be necessary to ensure that the court should not be called upon to recognise the validity of a marriage, for instance a polygamous marriage, if that would be contrary to public policy.

878. One witness suggested that recognition should be given to a decree of nullity in respect of a void marriage if it had been obtained in the country in which the marriage took place.

879. The recommendations of the Denning Committee, to which we have already drawn attention (in paragraphs 807–809), apply also to proceedings for nullity of marriage.

⁸⁰ *Easterbrook v. Easterbrook*, [1944] P. 10.

RECOMMENDATIONS OF THE COMMISSION

880. In our opinion, the law governing the jurisdiction of the English court in nullity proceedings and, to a lesser extent, the law governing the jurisdiction of the Scottish court, are not clearly defined. The same criticism is applicable to the law relating to the recognition of decrees of nullity obtained in other countries. We consider, therefore, that the present law in England and Scotland should be replaced by a comprehensive set of rules defining the jurisdiction of the court, the choice of law for the determination of the issues and the basis upon which recognition is to be given.

881. For reasons which appear in later paragraphs we think that for the purpose of defining the jurisdiction of the court, a distinction must be drawn between void and voidable marriages.

Jurisdiction in respect of void marriages

882. It is well established that any member of the public in his dealings with the parties to a void marriage may rely upon its nullity without the necessity of a judicial decree. It is also established that, if the question whether a marriage is void arises incidentally in other proceedings, there are no jurisdictional limitations upon the power of the court to make a declaration as to the nullity of the marriage, which will be binding on the parties themselves³¹. It seems to us reasonable, therefore, that either party to a void marriage should be entitled to ask the court for a declaration that will rank as a judgment declaratory of the parties' status.

883. There is one limitation which we think should be placed on the jurisdiction of the court in this respect. The applicant should either be domiciled in England or Scotland or be in England or Scotland at the commencement of the proceedings. We do not think that applicants will travel specially to England or to Scotland to take advantage of this jurisdiction because we are proposing that the court should look to the personal law of the parties for a determination of the issues, except those relating to an alleged lack of formalities. There would be no point in coming to England or Scotland if the remedy could be obtained from the court of the applicant's own country.

884. We recommend, therefore, that the courts in England and Scotland should have jurisdiction to entertain proceedings for declaring a nullity any marriage which is alleged to be void, if the applicant (i) is domiciled in England or Scotland, as the case may be, at the commencement of the proceedings, or (ii) is in England or Scotland, as the case may be, at the commencement of the proceedings.

885. We appreciate that one consequence of our recommendation will be that the court may be called upon to declare a marriage void for a cause which is not regarded by English or Scots domestic law as having that effect. This position may arise in several ways. For instance, the law according to which the issue has to be decided and the law of England or Scotland may both accept the ground generally as rendering a marriage void but may differ in their detailed requirements; thus, a formality required by the law of the country in which the marriage took place may not be essential to the validity of the marriage in England or Scotland. On the other hand, the ground may not be accepted at all by English or Scots law as rendering a marriage void, for instance miscegenation, which is a ground in the Union of South Africa and in some States of the United States

³¹ In the past the courts in England and Scotland have occasionally entertained nullity proceedings at the instance of a person other than one of the parties to the marriage. We see no reason to alter this.

of America. We do not regard that as a valid objection to our proposal, in as much as the court's decree is merely declaratory of the position under the personal law of the parties. Such a judicial endorsement of what in fact is the truth may be a matter of great moment to one or other of the parties, for example in dispelling rumours that reflect upon his or her moral conduct.

Choice of law in respect of void marriages

886. In the exercise of this jurisdiction we consider it essential that the court should have regard to the proper law to be applied for a determination of the issues. The law in England and Scotland, which has been our guide in this matter, admits a number of grounds upon which a marriage is to be regarded as void (see paragraph 265). These are not all the same in character. Failure properly to observe the prescribed ceremonies of marriage may be termed a "contractual" defect in the sense that it vitiates the contract itself at the outset and is wholly unconnected with the personal qualities of the parties. In our view, the appropriate law to govern such "contractual" defects is the law of the country in which the marriage was celebrated. We, therefore, recommend that, where a marriage is alleged to be void on the ground of lack of formalities, that issue should be determined in accordance with the law of the country in which the marriage ceremony took place.

887. The other defects which render a marriage void by English or Scots law are in the nature of "personal" defects and represent something peculiar to both the parties, for instance consanguinity, or to one of them, for instance non-age. Lack of consent has both contractual and personal aspects but we are inclined on the whole to classify it as personal. In our view, the question whether one of these defects has rendered a marriage void should be governed by the personal law of the parties at the time of the marriage, and not by the law of the country in which the marriage took place. We appreciate that the court may be asked to consider a cause of invalidity unknown to English or Scots domestic law, but we cannot conceive of a cause which is not based on lack of formalities or personal defect or disqualification in the parties.

888. We have already mentioned in connection with divorce (paragraphs 836-838) the manner in which we consider the personal law should be ascertained. There should be no distinction in this respect between proceedings for divorce and proceedings to obtain a decree of nullity of marriage. The question arises, however, whether, in having recourse to the personal laws of the parties in a case where each party had a different personal law at the time of the marriage, the court should decree the marriage null and void

- (i) if it is invalid by the law of one or other or both countries ; or
- (ii) only if it is invalid by the law of both countries.

We doubt whether it will often be found that the personal laws of the parties are in conflict but, where this happens, we consider that the English and Scottish courts should look to the law of that country which regards the marriage as a nullity (subject to the exception we now mention).

889. There are circumstances in which it would in our opinion be unfair to apply the personal law or laws of the parties at the time of the marriage. Suppose that a man domiciled in Denmark marries in Denmark a woman domiciled in England, she being the sister of his divorced wife, and that after marriage the couple settle in Denmark and live there for the rest

of their lives. By the law of Denmark, marriage with one's divorced wife's sister is allowed, although at present it comes within the prohibited degrees of relationship in England and Scotland. If the validity of the marriage were to be tested by the personal laws of the parties the marriage would be regarded in England as void and the children illegitimate, and, if the wife so wished, she could obtain a decree of nullity from the English court. We think that, subject to one qualification, the validity of a marriage should in the last resort depend on the law of the country in which the matrimonial home has been established, because the status of marriage pre-eminently affects society in the country where the parties live together as husband and wife. That country represents what has been called the "true seat of the marriage relation", and it seems socially undesirable that a union which is there regarded as not detrimental to the community should be pronounced void, merely because one or other or both of the parties were formerly connected with a country in which a different view prevails.

890. It would be undesirable, however, that the English and Scottish courts should be required to recognise the validity of a marriage celebrated in England or Scotland in circumstances which render the marriage void under English or Scots domestic law but not under the law of the country in which the parties have established their matrimonial home. Otherwise, the English or Scottish court might have to declare a marriage valid which had been celebrated in England or Scotland between persons who were under the age of sixteen years, or between persons who were already married, merely because they had established their matrimonial home in a country the law of which allowed marriages of persons under sixteen years of age or polygamous marriages. Marriages celebrated in England or Scotland must accordingly be treated differently.

891. We recommend, therefore, that where a marriage is alleged to be void on a ground other than that of lack of formalities, that issue should be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage should be declared void if it is invalid by the personal law of one or other or both of the parties); provided that a marriage which was celebrated elsewhere than in England or Scotland should not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out.

Jurisdiction in respect of voidable marriages

892. In its effect on the personal status of the spouses the annulment of a voidable marriage has the same effect as the dissolution of a valid marriage. It follows, in our opinion, that the jurisdiction of the court in respect of proceedings to annul a voidable marriage should be governed as far as possible by rules similar to those which regulate the divorce jurisdiction of the court. We recommend, therefore, that the English and Scottish courts should have jurisdiction to entertain proceedings for the annulment of a marriage which is alleged to be voidable, in the following circumstances:

- (i) if the applicant is domiciled in England or Scotland at the commencement of the proceedings; or
- (ii) if the applicant is in England or Scotland at the commencement of the proceedings and the place where the spouses last resided together was England or Scotland; or
- (iii) if the parties to the marriage are both resident in England or Scotland at the commencement of the proceedings.

893. The circumstances of hardship which have prompted us to recommend the assumption by the English and Scottish courts of a limited divorce jurisdiction on the basis of citizenship of the United Kingdom and Colonies (see paragraph 842) do not in our opinion apply with regard to jurisdiction in nullity. The courts of most, if not all, countries, are prepared to assume nullity jurisdiction and (almost universally) at the instance of a person who is domiciled there. In so far as the law of the country in which a person is domiciled may not accept some of the grounds on which a marriage is regarded as voidable in England or Scotland, we think that an Englishman or Scotsman must be prepared to have his rights governed by the law of the country in which he has chosen to become domiciled.

894. The inability of a wife under English and Scots law to acquire a domicile separate from that of her husband affects her right to take proceedings not only for divorce but also for the annulment of a voidable marriage³². We recommend, therefore, that a wife should be able to claim a separate English or Scottish domicile for the purpose of taking proceedings to annul a voidable marriage, in the same circumstances as we recommend should entitle her to claim a separate domicile for the purpose of taking divorce proceedings (see paragraph 825).

Choice of law in respect of voidable marriages

895. In respect of both divorce and the annulment of a voidable marriage we regard it as fundamental that the court, in determining the issues, should look to the personal law of the spouses as well as to English or Scots domestic law. It is clear, however, that the material time for identifying the personal law is different. In divorce proceedings, whether jurisdiction is founded on domicile or residence, the court should look to the position as it is at the time of the proceedings. In proceedings for nullity, the defect which is alleged to render the marriage voidable must have been present at the time of the marriage and, therefore, the court should have regard to the personal law of the parties at that time.

896. As in the case of void marriages, difficulty may arise if each party had a different personal law at the time of the marriage, especially if the marriage is voidable under one law but not under the other. We consider that the same rule should apply, that is to say, that the court should pronounce a decree so long as the marriage is voidable under one of the two laws. An examination of the grounds upon which a marriage may be voidable shows that for the most part they are dependent on the applicant being unaware of certain material facts. Matters so vital to marriage ought to be known to a prospective spouse before the marriage takes place; if he was not aware of them, then it seems right that he should have an opportunity to have the marriage annulled. Therefore, in our view, it would not be just if the complainant were to lose the protection of his personal law merely because he married someone whose personal law did not afford such protection. Nor would it be just if a person whose personal law would regard the marriage as voidable at the instance of the other spouse could shield himself behind the fact that the personal law of the other spouse did not regard the marriage as voidable.

897. We have considered whether the court should be required to refer to the law of the country where the parties intended to set up their matrimonial home, as we have suggested in respect of void marriages (see paragraph 891). In the case of a marriage alleged to be void, the views of the community to

³² See *De Reneville v. De Reneville*, [1948] P. 100.

which the spouses have belonged since their marriage should prevail. The annulment of a voidable marriage, however, is granted primarily in the interests of the individual. We consider, therefore, that an applicant should be entitled to claim any protection afforded by his own personal law or that of the other spouse.

898. A defect which would render the marriage voidable in England or Scotland may in some countries constitute a ground of divorce. In looking to the personal law of one or other of the parties, we think that the court should pronounce a decree of nullity of marriage if matrimonial relief, whether divorce or annulment of the marriage, would be afforded by the relevant personal law on the facts alleged.

899. We recommend, therefore, that where the court in England or in Scotland is asked to annul an alleged voidable marriage, it should not grant a decree unless the personal law of one or other or of both of the spouses at the time of the marriage recognised as sufficient ground for the annulment of the marriage (or for divorce) a ground substantially similar to that on which a decree is being sought in England or Scotland.

The basis of recognition

900. We consider that recognition should be given in England and Scotland to annulments of marriage obtained in other countries in conformity with the same guiding principles which, we suggest, should govern the recognition of decrees of divorce (see paragraph 848). The same considerations are applicable.

901. In preceding paragraphs we have recommended that in exercising jurisdiction in proceedings for nullity of marriage, the court should have regard to the personal law or laws of the parties at the time of the marriage. This is not a practice which is always followed in other countries, and it would seem that the English court at least, having once recognised the competency of the court of another country to assume jurisdiction in nullity proceedings, has in the past not always enquired whether the issues have been determined in accordance with the proper law³³. In order to avoid limping marriages, we consider that, so long as the annulment of a marriage has taken place, or would be given recognition, under the law of the country in which the parties are domiciled or of which they are nationals, it should not be necessary for the English and Scottish courts to pay attention to the law which has been applied to the determination of the issues. However, where jurisdiction has been exercised on some other basis recognised by the English and Scottish courts, we think that regard should be paid to the choice of law.

902. We recommend, therefore, that in England and Scotland, recognition should be given to the validity of an annulment of marriage, whether on the ground that it is void or voidable.

- (i) which has been obtained, whether judicially or otherwise, by a spouse in accordance with the law of the country in which both husband and wife were domiciled, or in which either the husband or the wife was domiciled, at the time of the proceedings, or which would be given recognition by the law of that country, or
- (ii) which has been obtained, whether judicially or otherwise, by a spouse in accordance with the law of the country of which both husband and wife were nationals, or of which either the husband or the wife was a national, at the time of the proceedings, or which would be given recognition by the law of that country.

³³ *De Massa v. De Massa*, [1939] 2 All E.R. 150, n.; *Galene v. Galene*, [1939] P. 237.

Recognition should be given irrespective of whether the issues were determined by the application of the law or laws which the English or Scottish court would itself have applied in like circumstances had those issues come before it.

903. We recommend also that recognition should be given to any annulment of a void marriage, which has been obtained in circumstances outside the scope of our recommendation in paragraph 902, provided that the annulment has been obtained in accordance with rules for the choice of law which are the same as those to be applied by the English or Scottish court; that is to say, the decision on any question of formalities should have been in accordance with the law of the country in which the marriage took place and the decision on any question relating to a personal defect or disqualification should have been in accordance with the personal law of one or other or both of the parties at the time of the marriage and with the law of the parties' intended matrimonial home. We see no need to require that the applicant should have been present in the country from which the annulment was obtained at the time of the proceedings.

904. We recommend further that recognition should be given to any annulment of a voidable marriage which has been obtained in the exercise of a jurisdiction based on residents in circumstances which do not bring it within the scope of our recommendation in paragraph 902, provided that the residence qualification is substantially similar to that which forms a basis of jurisdiction in England and Scotland and that the personal law of one or other or both of the parties at the time of the marriage would allow an annulment on the ground alleged.

905. Our remarks on the subject of providing for the possibility of the English and Scottish courts being required to recognise divorces obtained in a particular country designated by Order in Council apply equally to annulments of marriage (see paragraph 860).

906. An annulment of marriage may be obtained in some countries other than by process in the court of that country. We consider that no distinction should be made by the English and Scottish courts between annulments of marriage obtained judicially and annulments obtained otherwise (see also paragraphs 861-865).

907. We have mentioned in connection with the recognition of a divorce obtained in another country that the question arises whether the English court should refer to (i) the law of England at the time of the divorce, or (ii) the present law of England, in considering whether or not the divorce has been granted upon conditions substantially similar to those followed by the English court in respect of persons not domiciled in England (see paragraphs 853-855). Very much the same considerations apply to the recognition of annulments of marriage. We accordingly recommend that the English and Scottish courts should recognise as valid an annulment of a void or voidable marriage obtained before the coming into operation of any statute altering the basis of nullity jurisdiction in England or Scotland, under a jurisdiction which in the opinion of the English or Scottish court was exercised under conditions and principles substantially similar to those which the English or Scottish court itself followed at the date of the annulment. We recommend, further, that recognition should be given in England and Scotland to annulments of marriage granted in any other Commonwealth country within a period of three years after the coming into operation of any statute altering the basis of nullity jurisdiction in England or Scotland, under a jurisdiction exercised under the same conditions and principles as the English or Scottish court followed before the alteration in its jurisdiction took place.

MISCELLANEOUS

Declarations of status

908. We have said that the question of the recognition of a decree of divorce or nullity of marriage may be the only question to be decided by the court. At the time evidence was submitted to us there was considerable doubt whether the English court had jurisdiction to give a declaratory judgment as to the status of an individual in proceedings which were brought for that purpose alone. Apart from Section 17 (1), which is concerned with proceedings for a declaration of legitimacy, there is no specific provision in the Matrimonial Causes Act, 1950, or in the Rules made under it, enabling proceedings to be taken to obtain a declaration as to the validity of an applicant's marriage, divorce, or annulment of marriage. In the past, attempts had been made to get round what appeared to be a gap in the law by taking proceedings for jactitation of marriage.

909. The witnesses pointed out that the position was most unsatisfactory, since increased facilities for travel and large movements of population occasioned by war have resulted in an influx into England of a number of persons who were previously nationals of and domiciled in other countries. Moreover, a large number of marriages have taken place between Englishwomen and nationals of other countries who have subsequently taken divorce or nullity proceedings in their own country. In these latter circumstances, it was said, it is not always easy for the English wife to know whether the foreign divorce or annulment will be recognised as valid in England or whether she will herself have to take proceedings in England (always provided that the English court would have jurisdiction).

910. It was therefore suggested that the English court should be empowered to make declarations of status in such circumstances, and that this could conveniently be done by making Order 25, Rule 5, of the Rules of the Supreme Court applicable to proceedings in the Divorce Division of the High Court³⁴. However, the Court of Appeal has now decided³⁵ that Order 25, Rule 5, may in fact be invoked to ask the Divorce Division for a statutory declaration and applications have since been made to the court on this basis³⁶.

911. Although the difficulty no longer exists, we consider that, if the jurisdiction of the English court in matrimonial proceedings is to be embodied in statutory form, as we are suggesting, then the position with regard to the power of the court to make declarations of status should be put beyond doubt by giving it an express statutory power to do so in proceedings brought for that purpose alone; and we recommend accordingly. The circumstances in which the court may exercise jurisdiction to give a declaratory judgment as to status could then be defined clearly.

912. In Scotland, this problem has never arisen because the Scottish court has always had jurisdiction to pronounce upon questions of status arising out of marriage, divorce or annulment in actions of declarator of marriage and of declarator of freedom and putting to silence.

Proof of foreign law

913. It will be seen from our recommendations that we are advocating that more regard should be paid to the personal law of the spouses. It has been objected that to place this emphasis on the personal law will result

³⁴ Order 25, Rule 5, provides that "No action or proceeding shall be open to objection on the grounds that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not".

³⁵ *Har-Shefi v. Har-Shefi*, [1953] 1 All E.R. 783.

³⁶ *Dunne v. Saban*, [1954] 3 W.L.R. 908.

in the parties being put to greater expense in providing the court with proof of that law. We appreciate that this may well be so, and in the following paragraphs we make certain suggestions designed to lessen this expense. The expense would of course fall for the most part on those persons who by reason of the proposed alteration in the jurisdiction of the courts in England and Scotland would be able for the first time to take proceedings in these countries instead of being put to the trouble and expense of returning to their own country to bring proceedings in the court there.

914. In England and Scotland the question of what is the foreign law on a particular matter is a question of fact, which has to be proved, as other facts are proved, by appropriate evidence. This is given as a rule by calling properly qualified witnesses; these are usually foreign lawyers who are living in England or Scotland, but it may sometimes be necessary to obtain the evidence from a lawyer resident in the foreign country. The production of evidence by these means is often very expensive.

915. The practice in European countries by which a government may be asked to give an official statement of the law upon some particular matter has not been adopted in England or Scotland³⁷.

916. We consider that where in matrimonial proceedings in England or Scotland the court is required to have regard to the law of another country in order to determine an issue before it, it should be able to accept as sufficient evidence of that law an official certificate given by a competent authority of the country concerned. We contemplate that this procedure would in practice be confined to cases where the point upon which information is required is a simple one and is not an issue between the parties to the suit. Since a similar procedure is current in a number of other countries, there should be little difficulty in persuading missions of other countries in England to give the necessary certificates, for instance, as to the basis of divorce jurisdiction or the grounds of divorce in their own countries. The adoption of this procedure would be particularly useful in reducing the costs of an undefended suit.

917. We recommend, therefore, that in matrimonial proceedings in England or Scotland the court should be empowered to accept as sufficient evidence of the law of another country the certificate in writing of an official attached to an Embassy, or to the office of some duly accredited representative, of the country concerned, which certificate should be duly authenticated by the seal of the Embassy or office, or by a sworn statement in writing made by such an official.

918. One occasion when it is necessary for the court to have expert evidence is when the parties to a matrimonial proceeding were married in some other country. In some instances, there is statutory provision enabling the marriage to be proved without calling an expert witness³⁸. Otherwise, however, it is generally necessary in England to produce an expert witness, who is required to show that the certificate of marriage provided by the petitioner would be accepted in the country of its origin as *prima facie* evidence that a valid

³⁷ There are certain statutory provisions under which the English or Scottish court may remit to a superior court either in one of the other member countries of the Commonwealth or in other countries to which the relevant provisions have been extended by Order in Council, any question involving the law of that country in respect of which it is necessary or expedient to obtain a ruling for the disposal of a case; British Law Ascertainment Act, 1859, Foreign Law Ascertainment Act, 1861 (but no convention has ever been made under the Act), Foreign Jurisdiction Act, 1890. This procedure is seldom invoked since it involves considerable delay.

³⁸ For instance, the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, provides that duly authenticated marriage certificates are to be admitted in evidence; so far the Act has been applied by Order in Council to Belgium, France and the Australian Commonwealth.

marriage had taken place³⁹. In Scotland, however, a far simpler practice is followed. Where the existence of the marriage is not in issue, it is proved to the satisfaction of the Scottish court if one of the parties gives evidence to the effect that he or she was married to the other party and produces a certificate or other document of marriage issued in the country in which the marriage was celebrated. The Scottish procedure seems to us very sensible and we recommend that it should be adopted in England.

919. Another suggestion was made to us for reducing the length and costs of matrimonial proceedings in which the court is required to refer to the law of another country. This was that a digest of the matrimonial laws of other countries should be compiled of which the court might take judicial notice. The digest could be kept up to date by amendments issued whenever necessary and would set out, for instance, what grounds of divorce in other countries were to be treated by the English and Scottish court as substantially similar to the grounds in England or Scotland and in what countries the determinant of the personal law was nationality rather than domicile. We think that this proposal has distinct merit and we recommend that it should be given serious consideration. We do not envisage of course that it would be of any use in cases where the point of law was in dispute; it would then still be necessary for expert witnesses to be called.

³⁹ In *Rasmussen v. Rasmussen*, [1955] 5 C.L. 107, the court accepted a certificate in writing given by the ambassador of the country in question.

PART XIII

THE ADMINISTRATION OF THE LAW

INTRODUCTORY

920. We received a number of proposals for reforms in the administration of the law relating to matrimonial proceedings. We have found it possible to deal with some of these proposals in other parts of this Report; for instance, those relating solely to the practice of magistrates' courts in England have been included in Part XIV. We are left with various proposals, however, which do not fit readily into other parts and these are dealt with here.

921. We should first point out that undoubtedly we would have received many more such proposals with regard to England had it not been for the very comprehensive examination into procedural matters carried out by the Denning Committee. This Committee was appointed by the Lord Chancellor in 1946 under the chairmanship of Mr. Justice Denning (now a Lord Justice of Appeal) to examine the present system governing the administration of the law of divorce and nullity of marriage in England and Wales and to consider and report upon what procedural reforms were necessary, with special reference, *inter alia*, to expediting the hearing of suits and reducing costs. In its Second Interim Report¹ and its Final Report², the Denning Committee made a large number of detailed proposals for the reform of procedure in matrimonial causes. For this reason we have thought it unnecessary to undertake a general review of the procedural law.

922. Effect has been given to most of the Denning Committee's recommendations but there remain a few which have not been implemented. Some witnesses proposed that steps should now be taken to implement all these recommendations, others supported the implementation of specific recommendations. We asked why the recommendations of the Denning Committee had not all been implemented. We were told that they had all been considered in detail by the Supreme Court Rules Committee. Some were left in abeyance because it was thought that any alteration in the practice should apply not only to matrimonial causes but also to other actions proceeding in the High Court, and the practice in respect of such actions was at the time under review by the Evershed Committee. A few were not implemented because there was some good reason for not altering the existing practice.

923. We wish to make it clear that we have enquired most carefully into all the proposals which we received. For the sake of brevity, however, we have dealt as a general rule only with those proposals which we have found acceptable, making no mention of those proposals for the adoption of which we are satisfied that there is no good reason.

924. In the following paragraphs we deal separately with proposals for reforms in the administration of the law in England and in Scotland.

¹ Cmd. 6945.

² Cmd. 7024.

THE ADMINISTRATION OF THE LAW: ENGLAND

(1) CHILDREN

Issues as to paternity

925. A petitioner is required by the Matrimonial Causes Rules, 1950, to set out in the petition details of any living children of the marriage and, if it be the case, "that the parentage of any living child of the wife born during the marriage is in dispute". We were told that difficulties arise if the question of a child's paternity is not raised by one or other of the parties at the trial and subsequently an application is made for maintenance for that child. In the first place, it was said that, if a husband in his petition disputed the paternity of a child, the wife would be unable to claim maintenance for the child on the basis of its legitimacy if she had not raised the question of paternity before or at the trial. Secondly, it was said that, where a wife has stated in her petition that a child born to her is a child of the marriage, and this statement has not been disputed by the husband before or at the trial, and then the court grants the wife an order for custody of the child, the husband cannot afterwards dispute paternity in maintenance proceedings brought by the wife³.

926. Since the evidence was submitted to us the court has decided that a wife is not prevented from bringing an application for maintenance of a child merely by reason of the fact that she has not before or at the trial disputed a statement by the husband in his petition that he does not admit paternity⁴. We accept the principle adopted by the court in that case, namely, that a husband or wife should be free to raise the question of the paternity of a child at any relevant stage in the proceedings unless that question has been raised and decided by the court previously. In this connection, we think it undesirable that an award of custody by the court should carry with it any implication of paternity if the question of paternity has not been argued specifically before the court at the time of the custody proceedings. We recommend accordingly.

Representation of the children

927. The court already has power to order that the children should be separately represented on an application for a secured provision, settlement of a wife's property or variation of marriage settlements, if it considers that their rights or interests may be adversely affected (Rule 44 (3) of the Matrimonial Causes Rules, 1950). There are other occasions when, in our opinion, it may be desirable that children should be separately represented in matrimonial proceedings; for instance, when there is an issue before the court as to their custody or paternity. We recommend, therefore, that if in matrimonial proceedings in the High Court the court is of opinion that the children ought to be separately represented for the better protection of their rights or interests, it should have power to require this to be done.

928. A wider proposal was made to us with regard to the representation of children where the court has awarded damages to a petitioner and has ordered that the amount be lodged in court. On a subsequent application for the apportionment of the damages it is usual for the court, if there are children, to order that part, if not the whole, of the sum be used for their benefit. The children therefore have an interest in seeing, firstly, that the damages

³ See *Lindsay v. Lindsay*, [1934] P. 162.

⁴ *Watson v. Watson*, [1954] P. 48.

are paid into court, and secondly, that their rights are represented on the application for apportionment. At present, it was said, no one but the petitioner can take steps to enforce the order and there is no rule allowing the children to be separately represented on the application for apportionment, although the respondent is entitled to be heard. It was suggested, therefore, that the children, through their guardian *ad litem*, should be able to enforce the order, and be represented on the application for apportionment. Under the present law, however, the right to claim damages is given only to a spouse. We are not recommending any change in this principle, apart from its extension to a wife petitioner (see paragraph 434). It is undesirable, in our opinion, that the children should be given the right to enforce an order for which they have no right to apply. It should be open to the court, however, to order the separate representation of the children on the application for apportionment of the damages, in the exercise of the general power recommended in paragraph 927.

(2) EVIDENCE

Admissibility of previous findings

929. A finding against a party in one action is not evidence against that party in a subsequent action, unless the parties in both actions are the same⁵. Thus, if a husband is found guilty of adultery in proceedings for divorce brought against him by his wife and he is subsequently cited as co-respondent in divorce proceedings brought by the husband of the woman with whom adultery was committed, the adultery has to be proved again in the later proceedings by production of the material witnesses. It was suggested to us that the following exceptions to the rule ought to be made in respect of matrimonial proceedings:

- (a) that a finding of adultery in matrimonial proceedings should be *prima facie* evidence of that adultery in subsequent proceedings in which the parties are not the same;
- (b) that proof of a conviction for bigamy or for rape or any other sexual offence should be *prima facie* evidence of the commission of the offence for the purpose of matrimonial proceedings.

In support, it was said that the petitioner in the subsequent proceedings is now put to unnecessary expense and trouble to prove the offence again; moreover, in the case of sexual offences, the victim of the offence may be caused distress by having to give evidence again. The Denning Committee recommended that in matrimonial causes a previous finding against a party should be admissible in evidence (though not conclusive) in another proceeding against him although the other parties are not the same⁶. The Committee had in mind not only previous findings of adultery but also the case where proceedings are being taken for nullity of marriage on the ground of bigamy and there has been a previous conviction for bigamy.

930. We appreciate that usually it is "safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal"⁷. A general review of the rule was not undertaken by the Evershed Committee nor does such a review come within our terms of reference. Nevertheless, we think it desirable that there should be certain exceptions to the rule in respect of matrimonial proceedings. We do not suggest that the party against

⁵ *Hollington v. F. Hewthorn & Co. Ltd.*, [1943] K.B. 587, in which the authorities were fully reviewed.

⁶ Cmd. 7024, paragraphs 75-78, Final Report.

⁷ *Hollington v. F. Hewthorn & Co. Ltd.*, [1943] K.B. 587, at p. 602.

whom the finding has been made should be prevented from denying the commission of the offence in the subsequent proceedings⁸ but we do think that, for the reasons put forward by the witnesses, the burden of proof in such proceedings should shift from the person alleging the offence to the person charged with the offence as soon as the finding has been proved or admitted.

931. Accordingly we recommend that:

- (a) proof of a finding of adultery against a party to matrimonial proceedings in a court of competent jurisdiction in the United Kingdom should be received as *prima facie* evidence of his or her adultery in subsequent matrimonial proceedings in any court;
- (b) proof of a conviction by a court of competent jurisdiction in the United Kingdom for bigamy or for rape or other sexual offences should be received as *prima facie* evidence in matrimonial proceedings in any court of the commission of the act or acts of which the offender has been found guilty⁸.

932. It was also suggested that in matrimonial proceedings proof that a person had entered into a bigamous marriage, whether by production of a certificate of conviction for bigamy or by any other means, should raise a rebuttable presumption that that person had committed adultery. It was said that it is often difficult and expensive to obtain evidence of adultery, particularly when the person concerned is living in another country, whereas it is comparatively easy to prove that a bigamous marriage has taken place. We agree with the reasons given and we recommend accordingly.

Cross-examination as to adultery

933. A witness in proceedings instituted on the ground of adultery, whether a party to the proceedings or not, is not to be asked and, if asked, is not bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery (Section 32 (3), Matrimonial Causes Act, 1950). This rule was first introduced, with a slightly different form of wording, by Section 3 of the Evidence Further Amendment Act, 1869, consequent upon the removal of all restrictions on the competence of parties to matrimonial proceedings to give evidence on oath. Not only must a party not be asked questions about his adultery at the trial, but he cannot be required to answer interrogatories put to him beforehand nor to make discovery of documents⁹. The rule was criticised by the Gorell Commission¹⁰ as "a survival of ancient rules of evidence, intended to prevent a party from incriminating himself, although adultery is not a crime, and its effect as an ecclesiastical offence may be now-a-days disregarded". The Gorell Commission went on to say:

"The result is that, however guilty the petitioner may be, and however much the judge may suspect his or her guilt, so long as he or she confines his or her evidence to the case against the respondent, no questions can be put to the petitioner as to guilt on his or her side, and all that the court can do is to direct the King's Proctor's attention to the case. Moreover, if a respondent does not choose to appear, and the co-respondent does and fights the case, he is in a difficulty about compelling the respondent

⁸ Mr. Mace would go further. He considers that proof of a conviction on indictment for bigamy or for rape or other sexual offences should be *conclusive* evidence in matrimonial proceedings of the commission of the offence, on the ground that it would be undesirable to allow the offender the opportunity to re-open the matter and to question the decision of the court which had convicted him.

⁹ *Redfern v. Redfern*, [1891] P. 139.

¹⁰ Cd. 6478, paragraphs 381-386.

to give evidence; so also is a respondent, if a co-respondent will not contest a case. These restrictions should in the interests of justice be done away with."

The rule applies only to proceedings instituted on the ground of adultery and thus affords no protection if the petitioner is alleging cruelty or desertion.

934. Both the Gorell Commission and the Denning Committee¹¹ recommended that the rule should be abolished. They considered, however, that interrogatories on the question of adultery should not be permitted to be put to a party beforehand, on the ground that to allow such a practice might lead to abuse and would permit one party to pursue his or her suspicions by questioning the other. The Denning Committee also proposed that questions put to witnesses should be confined to the adultery charged specifically in the pleadings. Several of our witnesses made proposals for the abolition of the rule.

935. We consider that it is no longer necessary to protect the parties to a matrimonial suit or their witnesses from being questioned about their adultery. The conduct of the spouses is very material to the trial of the issues between them; the conduct of their witnesses may be relevant in so far as it relates to credit. The rule has had only a limited application since the introduction of grounds of divorce additional to that of adultery and we have had no suggestion that the lack of protection in proceedings based on those other grounds has caused any difficulty. In our view the court can be relied upon to prevent any abuse if the protection afforded by the rule is removed. We recommend, therefore, that the provisions of Section 32 (3) of the Matrimonial Causes Act, 1950, be repealed.

Declarations out of court as to non-access

936. Section 7 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now embodied in Section 32 (1) of the Matrimonial Causes Act, 1950), provided that the evidence of a husband or wife should be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period. Before that Act, evidence by a spouse of non-access had been inadmissible¹². It was suggested to us that there was some doubt whether the effect of Section 32 (1) of the Act of 1950 extended to declarations out of court and, if not, that it ought to do so. Subsequently the Court of Appeal has held¹³ that, although the provision of the Act is in terms appropriate only to evidence given by a husband or wife in judicial proceedings, this statutory abrogation of the substantive rule of law as regards such evidence necessarily has the effect of abrogating the old rule in the case where the evidence tendered is secondary evidence of a statement made by a husband or wife, who has since died. "The natural interpretation of the language" of the Section, said the Master of the Rolls, "is that . . . evidence of a husband or wife proving that marital intercourse did or did not take place during any period is admissible, whatever form such evidence takes according to the ordinary rules of evidence". In view of this decision we make no recommendation but wish to say that the decision is in accord with our views on what the position should be.

Child witnesses

937. Representations were made to us that it was wrong that children should be called upon to give evidence against one of their parents in matrimonial proceedings, and it was suggested that it should not be possible to

¹¹ Cmd. 7024, paragraphs 70-74, Final Report.

¹² The rule in *Russell v. Russell*, [1924] A.C. 687.

¹³ *In re Jenion, Jenion v. Wynne*, [1952] Ch. 454.

call children under the age of sixteen years as witnesses in such proceedings. We are, however, satisfied that it might cause hardship to a spouse if such evidence were excluded altogether. Moreover, the hardship might well be shared by the children themselves. For instance, they would suffer as well as their mother, if, through their incapacity to give corroborating evidence, their mother failed to establish her right to relief and protection from a cruel husband. We understand that in practice a party's legal advisers habitually proceed on the footing that young children should not be called upon to give evidence unless the evidence is absolutely necessary to enable that party to establish his or her case. We therefore make no recommendation for any change in the law.

(3) MAINTENANCE

Determination of liability and assessment

938. After pronouncing a decree, the trial judge may sometimes be asked to deal with the question of maintenance, usually where the terms of the proposed order have been agreed between the parties. Where the trial judge has not dealt with maintenance, it is provided by the Matrimonial Causes Rules, 1950, that, subject to direction by the judge, the matter should come before a registrar for an investigation into the allegations made in support of and in answer to the application; the registrar is empowered after investigation either to refer the matter to a judge or to make such order as he thinks fit, unless the application is for settlement of a wife's property or variation of settlements where there are children of the marriage, in which case the registrar must report to a judge, to whom the application is then adjourned. Most applications for maintenance are dealt with by a registrar without reference to a judge.

939. The determination of liability for maintenance is an important function of the court, since the result may be that a husband is required to support his former wife out of his income for an indefinite time, or that he has a substantial part of his capital tied up in order to make a secured provision for her. The Denning Committee took the view¹⁴ that the question of maintenance is too important to leave to the registrars. The conduct of the parties must be taken into account and a judge is the person most fitted to consider that question. The Committee also suggested that an application for maintenance should be heard by the trial judge immediately after the pronouncement of a decree; this would save time and money. Several of our witnesses proposed that the Denning Committee's proposals should now be implemented.

940. Against this view, it was said that in the majority of cases the determination of maintenance, if not actually agreed upon by the parties, is not a difficult matter. In complicated cases, in which it is necessary to examine books and accounts, it has been a long-established practice in the various Divisions of the High Court for the task of examination to be delegated to an officer of the court. Moreover, the findings of the trial judge as to the conduct of the parties are available to the registrar and, if any issue of adultery is raised, which was not dealt with at the trial, the matter has to be referred to a judge for his directions. The fact that appeals from the decisions of the registrars are comparatively few shows that there is public confidence in their work.

¹⁴ Cmd. 7024, paragraphs 35-44, Final Report.

941. We consider that there is no need to make any alteration in the present practice of the court in dealing with questions of maintenance. We think that it would be impracticable for all applications for maintenance to be dealt with by the trial judge. It is open to a spouse to ask the trial judge to deal with maintenance immediately after the pronouncing of a decree. It may well be, however, that in a defended suit each spouse will want time to consider his or her position in the light of the court's decision. Moreover, a detailed enquiry into the means of the spouses is often necessary ; this is best conducted in chambers. And to require all questions of maintenance to come before a judge would take up a great deal of judicial time. It is usual for the examination of accounts to be delegated to an officer of the court and we think that, by and large, the issues which arise in the course of an application for maintenance are suitable to be dealt with by the registrars. There is adequate machinery for them to become informed of the conduct and means of the spouses and to refer matters of difficulty to a judge for his directions.

(4) PLEADINGS

Address of the petitioner

942. At present a petitioner must disclose his or her address in the petition (Rule 4 (1), Matrimonial Causes Rules, 1950). It was suggested that it should be possible, with the leave of the court, to file a petition without disclosing in it the petitioner's address. This would be allowed, for instance, where a wife petitioner had reasonable grounds for fearing that her husband, on learning of her present address from the copy petition served on him, would cause a disturbance there.

943. We agree with the suggestion and accordingly recommend that the court should have a discretion to allow a petition to be filed which does not disclose the petitioner's address, provided that the address is disclosed to the court in some other way¹⁵.

Prayer for the exercise of the court's discretion

944. Rule 4 (3) of the Matrimonial Causes Rules, 1950, requires that a petition (for divorce or judicial separation) should conclude, where this is appropriate, with a prayer asking the court to exercise its discretion to grant a decree "notwithstanding the adultery of the petitioner during the marriage". It was pointed out that quite often the prayer contains a shortened form of wording which omits any reference to the adultery of the petitioner, with the result that a respondent spouse receiving a copy petition often fails to appreciate the implication of the reference to the court's discretion. We accept this criticism and we recommend that the full form of wording contained in Rule 4 (3) should always be used.

The position of the "woman named"

945. The present practice is that the "woman named" in a wife's petition for divorce on the ground of her husband's adultery is not made a party to the proceedings unless the petition contains a claim for costs against her. She must be served with a copy of the petition, however, and is entitled to appear and intervene in the suit. If she appears, she joins the proceedings at the stage which they have reached at the time of her appearance and her

¹⁵ It has been suggested to us that the address of the petitioner could be annexed to the petition in a sealed envelope to be opened only by leave of a judge or registrar.

name is then added to the title of the suit. On the other hand, a man who is charged with adultery in a husband's petition for divorce, if living at the time of filing the petition, must be made a co-respondent and a party to the suit, although the court has a discretion to order otherwise in exceptional circumstances, for instance where his identity cannot be ascertained.

946. Several witnesses proposed that the "woman named" should be treated in exactly the same way as a male co-respondent. We can see no reason why there should now be any difference in the treatment of male and female adulterers, particularly if a wife petitioner is to be given the right to claim damages on the ground of adultery. We recommend, therefore, that where a wife asks for divorce or judicial separation on the ground of adultery, she should be required to make the "woman named" a party to the suit unless she is excused by the court on special grounds from so doing.

(5) THE QUEEN'S PROCTOR

947. The Matrimonial Causes Act, 1857, provided for a single decree of dissolution of marriage, leaving the parties free to marry again as soon as it was clear that there would be no appeal from the court's decision. Shortly after the passing of the Act of 1857, some anxiety was felt that parties were obtaining divorce decrees either collusively or without presenting material facts to the court. It appears that the judge found it extremely difficult to carry out the requirement that he should satisfy himself of the absence of bars to relief, in particular collusion, in undefended cases, where only one side of the case was presented to the court. To meet this criticism, it was provided by the Matrimonial Causes Act, 1860, that the court should pronounce in the first place a decree *nisi*, which would be followed by a decree absolute if no objection was raised within a period of three months¹⁶. At the same time the Act of 1860 provided:

- (1) that the court could require the Queen's Proctor to appear by counsel before it to argue any question relevant to the proceedings¹⁷;
- (2) that, if the Queen's Proctor suspected that the proceedings were collusive, he could with leave of the court intervene and appear in the proceedings at any stage;
- (3) that, in addition, any person, including the Queen's Proctor, could intervene and appear in the proceedings to show cause why the decree *nisi* should not be made absolute on the ground that it had been obtained by collusion or by reason of material facts not having been brought before the court.

The powers and duties of the Queen's Proctor are now contained in Sections 10, 11, 12 (2) and 16 of the Matrimonial Causes Act, 1950.

948. Proposals which we have received concerning the office and duties of the Queen's Proctor fall under three heads:

- (a) abolition of the decree *nisi* and of the office of Queen's Proctor;
- (b) the length of the period which must normally elapse before a decree *nisi* can be made absolute;

¹⁶ The period was extended to six months by the Matrimonial Causes Act, 1866. In 1946 it was reduced to six weeks, following a recommendation by the Denning Committee. The court may shorten the period in any particular case if an application is made for expedition.

¹⁷ The marginal note to the Act of 1860 reads, "Court may, where One Party only appears, require Counsel to be appointed to argue on the other Side".

- (c) extension of the Queen's Proctor's functions, with regard to appeals at public expense on points of law of exceptional public interest.

We deal with each of these separately.

(a) ABOLITION OF THE DECREE *NISI* AND OF THE OFFICE OF QUEEN'S PROCTOR

949. The assistance of the Queen's Proctor is invoked by the court in the following classes of case:

- (i) Where at any stage in the case a point of law arises and the court desires to have the matter fully argued (see also paragraph 961).
- (ii) Where the court at the hearing is not satisfied with the evidence. It may suspect that it is false or that there has not been a full disclosure. The court adjourns the hearing and refers the case to the Queen's Proctor to make enquiries and generally to assist the court at the adjourned hearing. In these cases the Queen's Proctor may take one of two courses: he may with the leave of the court intervene in the suit at that stage—for instance, if he is satisfied that material facts have been withheld from the court or that there is collusion or some other circumstance which justifies his intervention¹⁸. If he does not feel justified in intervening, he reports to that effect by counsel in court. This report usually satisfies the court: but the court may, on the other hand, give directions to the Queen's Proctor to take such part in the further conduct of the suit as it thinks fit—for instance, the Queen's Proctor may be asked to attend at the adjourned hearing for the purpose of cross-examining certain witnesses or to argue the law.
- (iii) Where the court makes a decree *nisi* but refers the matter to the Queen's Proctor for investigation. The Queen's Proctor then makes such investigations as he thinks fit and, if the circumstances justify that course, shows cause why the decree should not be made absolute.
- (iv) Where the petitioner applies for the making of the decree *nisi* absolute to be expedited.

950. The Queen's Proctor can also with the leave of the court intervene of his own motion before decree *nisi*, on the ground that there has been collusion or some other circumstance justifying his intervention¹⁹. After decree *nisi* he may without leave show cause why the decree should not be made absolute.

951. The Queen's Proctor rarely intervenes of his own motion before decree *nisi*. The usual case is that in which the Queen's Proctor shows cause after decree *nisi*. A member of the public may have called the attention of the Queen's Proctor to matters which caused him to make enquiries; or the solicitors acting in the case may have given information to the Queen's Proctor of material circumstances which came to their knowledge after the decree. Additionally, it is the practice of the Queen's Proctor to select cases at random for investigation. In all these cases, if it is thought that cause should be shown against the decree, the directions of the Attorney-General are obtained and, if he so directs, the allegations of the Queen's Proctor are brought before the court.

952. Several witnesses suggested that the practice of pronouncing a decree *nisi* of divorce or nullity of marriage should be discontinued and that the office of Queen's Proctor would not then be required. These proposals depend to some extent on other proposals made by the witnesses for an extension of the

¹⁸ See *Sloggett v. Sloggett*, [1928] P. 148.

¹⁹ He may also do this after a reference to him to argue a point of law.

grounds of divorce, as a result of which the incentive to bring a collusive action would largely disappear and it would become unnecessary to make collusion a bar to relief. Independently of these proposals, however, it was said to be in itself undesirable that there should be an official charged with such duties and powers. On the other hand, other witnesses supported the retention of the decree *nisi* and of the office of Queen's Proctor.

953. The Denning Committee considered this question²⁰. It was not prepared to recommend that the decree *nisi* should be abolished since, in its opinion, any legitimate criticism had been taken away by the reduction²¹ to six weeks of the period which must normally elapse before the decree *nisi* can be made absolute. The Committee thought that the present practice served a useful purpose by enabling the Queen's Proctor to intervene where the proceedings were collusive or fraudulent.

954. We have said elsewhere that we are not proposing to recommend any material change in the existing bars to relief. So long as the court has to be satisfied positively that these bars are absent, we consider that there must be some period of time before a decree of divorce or nullity of marriage becomes final. Moreover, this procedure constitutes one effective means of protecting the court against the presentation of a false case. It follows, therefore, that we are not prepared to recommend the abolition of the office of Queen's Proctor. The fact that there is an officer of the court charged with the duty of investigating a case which is suspected to be false or collusive, in our opinion serves as a very useful deterrent and safeguard, besides being of great assistance to the court in the discharge of its duties.

(b) THE LENGTH OF THE PERIOD WHICH MUST NORMALLY ELAPSE BEFORE
A DECREE NISI CAN BE MADE ABSOLUTE

955. The Denning Committee came to the conclusion that a period of six months was too long for a spouse to have to wait before he or she could apply for the decree *nisi* to be made absolute and that six weeks would be sufficient to enable the Queen's Proctor to exercise his functions, without imposing an overlong wait on the successful spouse. Where the Queen's Proctor desired more time in which to complete his investigations he could always intervene in the suit so as to keep the matter open. As a result of the Committee's recommendations the period was therefore reduced from six months to six weeks²².

956. In his evidence to us²³, the then holder of the office of Queen's Proctor said that he would prefer that the period of six weeks should be extended to three months, on the ground that six weeks was not long enough for him to make his enquiries. The present holder of the office has confirmed this view and has pointed out, in support, that the Queen's Proctor rarely has the full six weeks available for his enquiries, since often the information which leads to an investigation is not given to him until some little time after the proceedings have been reported in the press, and he has then to obtain a transcript of the evidence at the trial. He also thought that it would be wrong for the Queen's Proctor to enter an appearance unless and until he had obtained evidence which in his view amply justified his intervention in the suit. To do otherwise might well be considered an abuse of the powers given to him in relation to the rights of private persons.

²⁰ Cmd. 7024, paragraphs 58-64, Final Report.

²¹ As a result of the recommendation in the Committee's First Interim Report.

²² By the Matrimonial Causes (Decree Absolute) General Order.

²³ See QQ. 8593-8595, Minutes of Evidence, Thirty-sixth Day (Sir Thomas Barnes).

957. This is a matter in which the interests of the individual must be weighed against the interests of the community. On the one hand, it is desirable that a petitioner who has obtained judgment in his favour should be able to act on that judgment as soon as possible. As the Denning Committee pointed out, a petitioner would have to wait six weeks in any event in order to give the other parties to the suit time to appeal; to provide that the decree *nisi* should not be made absolute until six weeks have elapsed imposes no additional delay. On the other hand, it is in the interests of the community that the process of law should not be abused by the taking of false or collusive proceedings. There is the evidence of two successive holders of the office of Queen's Proctor that six weeks is too short a period for the Queen's Proctor to carry out his functions properly. We enquired whether this difficulty could be met by providing him with additional staff, but we are satisfied that the difficulty would remain, since to employ more agents on any particular case would not as a rule reduce the time required for its investigation.

958. In the light of the evidence before us, we consider that the period of six weeks is too short and accordingly we recommend that the period which must normally elapse before a spouse who has obtained a decree *nisi* can apply for it to be made absolute should be increased from six weeks to three months.

959. The spouse against whom a decree *nisi* has been pronounced may, at any time after three months from the earliest date on which the other spouse could have applied for the decree to be made absolute, himself or herself apply to the court for that purpose. It was suggested to us that the period should be reduced to three weeks. This proposal was first made by the Denning Committee and we recommend that it should now be implemented. Possible objections are that this would be making too great a concession to the guilty spouse and that often the reason why a petitioner does not apply immediately for the decree *nisi* to be made absolute is because the respondent spouse is in default on maintenance payments or has not paid the costs of the suit. On the other hand, it may be said that the petitioner has elected to take steps to put an end to a marriage and it is not reasonable that, having obtained a decree *nisi*, he should delay longer than is necessary before taking the final step. Three weeks is, in our view, a sufficient time to allow for that purpose. The respondent's default in the payment of maintenance or costs can be brought to the notice of the court when he applies for the decree *nisi* to be made absolute.

(c) APPEALS AT PUBLIC EXPENSE ON POINTS OF LAW OF EXCEPTIONAL PUBLIC INTEREST

960. One of the matters which the Evershed Committee was expressly charged to consider was "what appropriate machinery might be evolved to enable cases involving points of law of exceptional public interest (arising in any Division of the High Court or in the Court of Appeal) to be determined wholly or partly at the public expense, whether by making the Attorney-General or the King's Proctor a party to litigation or otherwise". The Committee's recommendations²⁴ were that, where the Attorney-General considers that a case involves a point of law of exceptional public interest, he should have power to issue a certificate authorising public funds to be used to assist the parties to prosecute the case in accordance with the

²⁴ See the summary of recommendations in paragraph 677 of the Committee's Final Report, Cmd. 8878.

ordinary appeal procedure. After the grant of a certificate the parties would be left to contest the case in their own way, but the Attorney-General should have the right to appear and be heard on the question of law involved and, if he so desires but with leave of the court, to intervene and become a party. Where no application for assistance is made, but the case involves a point of law of exceptional public interest, the Attorney-General should have the right to apply for leave to intervene and become a party, but only on terms of offering all parties to the suit assistance from public funds. The parties to a case in which there is an appeal at the public expense should be bound by the result, except where they already have accrued rights, e.g., because they have settled their differences. In such an exceptional case the Attorney-General should have the right to intervene for the purpose of prosecuting an appeal at his own suit but the result should not affect the rights of the parties. These recommendations were not, however, to apply to matrimonial causes, to which the Committee gave separate consideration²⁵.

961. The Evershed Committee remarked on the fact that in matrimonial proceedings the court can ask the Queen's Proctor to argue before it any question which it "deems necessary or expedient to have fully argued". The assistance of the Queen's Proctor is frequently invoked by the court when a question of law of unusual importance or difficulty arises, especially in undefended cases where the court wishes to have the benefit of argument on both sides before coming to a decision. As the Committee pointed out, the Queen's Proctor is not in those circumstances entitled to intervene and become a party to the suit. In consequence, he has no right of appeal if he thinks that the court's decision is erroneous. It may well happen, therefore, that, although a question of exceptional public interest is raised in the course of matrimonial proceedings, an authoritative statement of the law by a higher tribunal cannot be obtained, because of the parties' lack of funds or lack of interest, coupled with the inability of the Queen's Proctor to take the matter further²⁶.

962. The Evershed Committee considered a proposal that, to remedy this defect, Section 10 (1) of the Matrimonial Causes Act, 1950, should be amended so as to provide that, where the assistance of the Queen's Proctor is asked for by the court for the purpose of arguing any question of law which the court deems it necessary or expedient to have fully argued, he should have the right, where so directed by the Attorney-General, and with leave of the court, to intervene and become a party to the suit in a case where the question of law involved was one of exceptional public interest. Upon the intervention of the Queen's Proctor, the other parties to the suit should have the right to a certificate from the Attorney-General for assistance out of public funds in relation to the costs attributable to the argument upon the question of law. There was, however, a difference of view among members of the Committee on the question, firstly, whether there was any real need to make the provision suggested in respect of matrimonial causes and, secondly, whether a decision obtained by the Queen's Proctor as the result of an appeal should be binding on the parties to the suit. The Committee therefore made no recommendation on the matter but suggested that it might be thought by this Commission to be a proper subject for consideration.

²⁵ Cmd. 8878, paragraphs 670-676.

²⁶ The case of *Baxter v. Baxter*, [1948] A.C. 274, is often cited in this connection, since, had the decision of the Court of Appeal not been against the petitioner, the case could not have gone to the House of Lords for determination of the question whether the use of contraceptives throughout the marriage prevented it from being consummated.

963. In the first place, we should say that, if the procedure recommended by the Evershed Committee is to be introduced in respect of other types of proceedings, we think that there should be some machinery whereby points of law of exceptional public interest which arise in the course of matrimonial proceedings could similarly be brought before a higher tribunal for an authoritative decision. The principal methods by which a point of law of exceptional public interest could be brought before a higher court appear to be as follows:

- (i) By allowing the Queen's Proctor to intervene and become a party to the suit for the purpose of prosecuting an appeal, on terms that assistance from public funds is offered to the other parties for the purpose of taking part in the appellate proceedings. This could operate in respect of any matrimonial proceeding or could be limited to those proceedings in which the Queen's Proctor had been asked by the court to assist it by argument (that is, the proposal put to the Evershed Committee—see paragraph 962).
- (ii) By allowing the Queen's Proctor to offer assistance from public funds to enable an appeal to be prosecuted, without himself taking part in the proceedings.
- (iii) By allowing the Queen's Proctor to take a consultative case to the appropriate higher court, based on the facts of the actual case in which the point of law had arisen.

The crux of the problem is whether a decision obtained as a result of intervention by the Queen's Proctor should be binding on the parties.

964. We think that if the Queen's Proctor is to be allowed to become a party to the proceedings or to provide assistance from public funds to enable an appeal to be prosecuted, it must follow that the decision reached by the appellate court should be binding on the parties. Against this, it was said that it would be extremely undesirable to allow the Queen's Proctor, as an officer of the court, to intervene in matrimonial proceedings and to obtain a decision affecting the marital status of the parties to the suit against their will. This is possible now, of course, but the Queen's Proctor's present powers of intervention are strictly limited to cases where the court is likely to be, or has been, deceived by one or both parties, whether wilfully or unintentionally. Moreover, if the Queen's Proctor were to offer to provide assistance from public funds, he would be encouraging an unsuccessful party to appeal from a decision when the latter would not otherwise have done so. It may well be desirable to introduce this procedure in ordinary civil suits, but it would be quite wrong to do so in proceedings in which the personal status of the parties is at stake.

965. On the other hand, it was said that in practice the case which the Queen's Proctor would usually want to take to an appellate court would be where the court below had granted a decree to one of the spouses and the Queen's Proctor considered that in law that spouse was not entitled to a decree. In those circumstances, the decision ought to be binding on the parties, since the successful spouse would have no legitimate ground of complaint if the appellate court decided to rescind the decree.

966. We consider that it would be wrong to give the Queen's Proctor any further power than he has at present to bring the case before the court again, if in consequence the personal status of the parties were once more put in issue. We do not think that any such proposal could be limited to cases where the Queen's Proctor had been called in to assist the court below by arguing on a point of law. It could well happen that the court came to a decision without the Queen's Proctor's assistance, and it subsequently

became apparent that a point of law which had arisen in the course of the proceedings ought to receive consideration by a higher tribunal at the earliest opportunity. The possibility, therefore, could not be ruled out that the Queen's Proctor might wish to take a case on appeal where he thought that relief should have been granted to a spouse. It would be undesirable if a marriage were to be dissolved at the instance of a party other than one of the spouses.

967. On the other hand, we consider it important that there should be some machinery whereby a point of law of exceptional public interest, which has arisen in the course of matrimonial proceedings, can be brought before a higher court if there appears to be general dissatisfaction with the decision of the court below. The solution which appeals to us is that the Queen's Proctor should be able to bring a consultative case based on the facts of the actual case in which the point of law has arisen. The parties to the actual case should not be involved in the appellate proceedings, and the decision of the court should not be binding on them. It has been objected that to allow a consultative case to be taken to the appellate court on this footing would result in an anomalous position attended by many undesirable consequences affecting, *inter alia*, the status of future children born to the parties and questions of succession. We do not agree. The essence of our proposal is that the consultative case must be regarded as quite distinct from the matrimonial proceedings which have given rise to it. The position then is really no different from that which may arise at present where a divorce has been granted to a party on an interpretation of the law which an appellate tribunal in a later case (between different parties) refuses to accept.

968. Accordingly, we recommend that, where it is considered desirable that a decision of the Divorce Division or of the Court of Appeal, given in matrimonial proceedings and involving a point of law of exceptional public interest, should be reviewed by a higher court, then, provided that none of the parties intends to appeal from that decision, or the time for appeal has elapsed, the Queen's Proctor (under the direction of the Attorney-General) should be able to bring before the appropriate appellate court a consultative case based on the circumstances of the actual case in the court below; the decision in the consultative case should not be binding on the parties to the actual case but in all other respects should carry the authority of the tribunal which gave it. We contemplate that the powers of the Queen's Proctor in this respect should not be limited to cases in which he has been called upon to argue the point of law in the court below. Moreover, we consider that the decision in the consultative case should in no circumstances give a right of appeal to any of the parties to the actual case.

THE ADMINISTRATION OF THE LAW: SCOTLAND

(1) ALIMENT

Procedure for obtaining aliment

969. An action of separation and aliment or of adherence and aliment may be raised either in the Court of Session or in the Sheriff Court, but the majority of such actions are brought in the Sheriff Court. The procedure there is as formal as that followed in a divorce action, and litigation between the spouses is expensive, because of the number of procedural steps which must be taken before the case is finally disposed of by the court. While the provision of legal aid has relieved the hardship to the

wife of small means, the expenses add considerably to the burden imposed on the husband, or, if he is unable to meet them, to the burden on the legal aid fund. The time taken to obtain a decree in the Sheriff Court varies: if the application is unopposed, two months may be regarded as the usual time: if the action is defended, it may take six months or even longer to obtain a decree. If the wife is in urgent need, it is not unusual for her to obtain in the first place an order for interim aliment by separate proceedings, and this of course will add to the cost.

970. Whatever may have been the position in the past, there is little doubt that nowadays actions for separation and aliment or adherence and aliment are often brought by wives primarily in order to obtain aliment. In such circumstances, where there has been adultery or cruelty or desertion on the part of the husband, we consider that the wife should be able to obtain a decree of the court as quickly and inexpensively as is consistent with justice. In our opinion, the present procedure is unduly long and complicated and is unnecessarily expensive. The expense also reacts on the husband's ability to pay adequate aliment. We have been much impressed by the manner in which a wife may obtain an order for maintenance by a summary procedure in the magistrates' courts in England and Wales. We do not suggest that this system should be introduced in Scotland, but we do think that a simplified procedure should be adopted in the Sheriff Courts for dealing with actions of separation and aliment and adherence and aliment.

971. The disposal of actions in a summary way is not new to the law of Scotland. With the object of removing formality and limiting expenses, provision has been made for dealing summarily with Small Debt actions. In the Small Debt Court many of the procedural steps are dispensed with; the application is made on a printed form and the defender is merely cited to appear before the Sheriff Court on a fixed day, when the case is called in court. Applications for interim aliment are sometimes dealt with at present under the Small Debt procedure.

972. We think that a procedure on the lines of that followed in the Small Debt Court would be suitable for dealing with all actions of separation and aliment and adherence and aliment in the Sheriff Court, in which the amount of aliment asked for does not exceed £5 per week for the wife and, if there are children, £1 10s. per week for each child. We suggest that a financial limit should be set because we do not think that the Small Debt Court procedure would be appropriate where more substantial aliment is sought and a detailed investigation into books and accounts may be required.

973. There are two respects in which the present procedure in Small Debt actions would not be appropriate for dealing with matrimonial proceedings. Firstly, in Small Debt actions, if the defender does not appear in court on the case being called, the court does not enquire into the circumstances but grants a decree forthwith in the terms of the pursuer's crave. We think that it would be wrong to allow a decree in matrimonial proceedings to be obtained in this way. It follows that the rule that there must be a proof in all consistorial actions should continue to apply in actions which are dealt with under this summary procedure.

974. Secondly, unless the Sheriff has acted corruptly or oppressively or without jurisdiction, no appeal is allowed in Small Debt actions. We consider that in consistorial actions dealt with under the summary procedure an appeal on questions of law should be allowed by way of a stated case to the Court of Session.

975. We are satisfied that, if the procedure we have suggested were adopted for dealing with actions of separation and aliment and adherence and aliment in the Sheriff Court, there would be a substantial saving in expense. There would also be a considerable saving in time, particularly in the time taken to dispose of a defended action, and it would often be unnecessary to take proceedings to obtain interim aliment.

976. Accordingly, we recommend that where a wife wishes to raise an action against her husband in the Sheriff Court for separation and aliment, or adherence and aliment, or any other action in which she seeks a conclusion for the payment of aliment, and the amount of aliment claimed does not exceed the sum of £5 per week for the wife and £1 10s. for each child (if any), the proceedings (including proceedings for the variation or termination of the order) should be conducted and disposed of by a simplified procedure on the same lines as that applicable to Small Debt actions, but subject to the qualifications set out in paragraphs 973 and 974. This procedure should also apply to actions for aliment brought by a husband.

The jurisdiction of the Sheriff Court

977. The general principle is that a pursuer must raise an action in the district in which the defender resides or carries on business. This principle governs actions for separation and aliment, adherence and aliment and interim aliment brought in the Sheriff Court. The Maintenance Orders Act, 1950, introduced an exception, in as much as a wife may raise such an action in the Sheriff Court for the district in which she resides, if the husband resides in England or Northern Ireland and the spouses last resided together as man and wife in Scotland.

978. A wife may often be put to considerable trouble and expense in pursuing an action against her husband if he is living in another part of Scotland; she may even be deterred from taking proceedings at all. We think it reasonable, therefore, that she should have the alternative of raising the action in the Sheriff Court for the district in which she lives. On the other hand, there may be cases where it would be unreasonable for her to insist on this right; for instance, where all the witnesses live in another district and it would be more convenient (and less expensive) if the proceedings were taken in the Sheriff Court for that district. In circumstances such as those we think that the Sheriff Court in which the action is raised should have the power to transfer the action to whichever other Sheriff Court is considered more appropriate.

979. We recommend, therefore, that, in addition to its present jurisdiction, the Sheriff Court should have jurisdiction to entertain an action for separation and aliment or adherence and aliment or any other action in which one spouse is concluding for aliment against the other spouse, if the pursuer resides within the sheriffdom. We recommend further that the Sheriff Court should have power *ex proprio motu* or on cause shown to transfer any such action to any other Sheriff Court if it appears that that court is a more appropriate venue; the court to which the action is thus transferred should then have jurisdiction to deal with it.

The machinery of enforcement

980. Another general principle of Scots law is that a successful litigant must himself take such steps as are necessary to enforce a judgment in his favour. The court gives no assistance. If a husband defaults in making payments under an order for aliment, it is open to the wife to proceed to have his wages arrested in respect of the amount of the arrears, or to attach

his moveable effects or to apply for him to be sent to prison. Although she may in theory take these steps without professional assistance, in practice it is necessary for her to employ a solicitor to carry out the required procedure. If she was legally aided in the proceedings in which she obtained her order for aliment, she may return to the solicitor who acted for her then, since the operation of the legal aid certificate extends to the doing of diligence to enforce compliance with the order. Otherwise, she must apply for legal aid, if she has insufficient means to employ a solicitor. The solicitor sees that the necessary technical steps are taken to enforce the decree.

981. We had before us a proposal that an officer of the Sheriff Court should be responsible for collecting payments under an order for aliment and for assisting the wife to take the necessary steps to enforce the payments if these fall into arrear. A similar system has operated in the magistrates' courts in England and Wales with very satisfactory results for a considerable time. Criticism was directed at the present Scottish procedure on the ground of delay and expense.

982. This proposal has much to commend it. The fact that, unless the court directed otherwise, payments would be made to an officer of the court, for instance the Sheriff Clerk or his depute, would ensure that an accurate account was kept; this would be useful if it became necessary to enforce the order. If the court were required to assist the wife in proceedings for enforcement, the burden of expense upon the parties would be considerably reduced. It should be possible also to cut down the present delay; for instance, we understand that it is sometimes difficult to secure the services of Sheriff Officers, whose number is now quite small.

983. Against the proposal is, of course, the fact that it involves a departure from a general principle of Scots law. Its adoption would mean that the Sheriff Courts would require more staff to deal with the extra work. Moreover, before official process servers could be employed the status of the present body of Sheriff Officers would have to be reviewed²⁷. We were told that although the legal profession would not be sorry to be rid of the obligation to enforce orders for aliment at the instance of wives, since this involved a lot of trouble for inadequate remuneration, yet it considered that the practical difficulties would not be solved by placing the burden of enforcement on the court²⁸.

984. We think that it would be desirable that payments under an order for aliment (made in proceedings between husband and wife in the Sheriff Court) should be made to an officer of the court and that the court should assist the wife to enforce her order if the payments fall into arrear, in particular by providing for the service of process by an officer of the court. As we have pointed out, this would involve a radical departure from the principles governing the law of diligence in Scotland and, for this reason, the proposal should be considered in the course of a general review of that law. If we were to undertake such a review we should be going outside our terms of reference. We understand that there is a body of opinion within the legal profession in Scotland which feels some dissatisfaction with the law of diligence and favours the appointment of a body charged with its review. When such a review is undertaken, we consider that the question of the enforcement of orders for aliment (made in proceedings between husband and wife in the Sheriff Court) should be examined with a view to

²⁷ We have noted in this respect the observations made by the Departmental Committee on Messengers-at-Arms and Sheriff Officers (Scotland) in its Further Report (1925).

²⁸ See QQ. 5715 and 5773, Minutes of Evidence, Twenty-fourth Day (Law Society of Scotland).

introducing machinery on the lines we have suggested above. We see no reason in principle why the collection and enforcement of payments under an order for aliment as between husband and wife should not be treated differently from payments under other orders.

The Maintenance Orders (Facilities for Enforcement) Act, 1920

985. The Maintenance Orders (Facilities for Enforcement) Act, 1920, makes provision for the registration and enforcement in England or Northern Ireland of orders for the maintenance of a wife or children made by a court in any of the Commonwealth countries to which the Act has been applied by Order in Council. Maintenance orders made by the High Court or a 'magistrates' court in England or Northern Ireland may also be registered and enforced in those territories. Magistrates' courts in England and Northern Ireland are expressly empowered by the Act to make provisional orders which are subject to confirmation by the court of the country in which the husband is living. It has been suggested that the provisions of the Act should now be extended to Scotland, so that orders for aliment made by the Scottish courts could be enforced abroad and orders for maintenance made abroad could be enforced in Scotland.

986. We understand that the objection to the application of the Act to Scotland is based on the fact that it would involve a serious breach in the principle generally accepted that a litigant must sue in the court of the defender. It would be contrary to that principle, it is said, to allow the Scottish courts to accept for registration and enforcement an order made against a person resident in Scotland or to entertain an action against a defender resident in another country.

987. To appreciate how far this may be a valid objection it is necessary to deal separately with the various circumstances in which the original order may have been made. In the first place, if the husband was at the time of the proceedings within the territorial jurisdiction of the court making the order, or had submitted to its jurisdiction, we can see no reason why the order should not be enforced against him in Scotland if he has subsequently come to live there. On the other hand, the husband may have left the country in which his wife lives before she could obtain a maintenance order against him. In those circumstances the Act of 1920 envisages that the wife should be able to obtain from her own court a provisional order against her husband in his absence; the provisional order has no effect, however, until it has been confirmed by a competent court in the country in which the husband is living. Again, we can see no reason why that procedure should not be applied to Scotland, by giving the Sheriff Court power to make and to confirm provisional orders. We are then left with the possibility that a court in some other country may make a maintenance order, which is not expressed to be provisional, against a husband who is not subject to its jurisdiction and who has not submitted to its jurisdiction. We appreciate that according to Scottish legal practice an order made in those circumstances would be regarded as having been made without jurisdiction and the Scottish court could not be expected to accept it for registration and enforcement. The provisions of the Act, however, are made applicable to the various Commonwealth countries by separate Order in Council; an enquiry into the circumstances in which the courts of a particular country will assume jurisdiction to make maintenance orders would ensure protection in this respect.

988. Much of the hardship suffered by wives who were unable to enforce an order for aliment has been relieved by the Maintenance Orders Act, 1950, which provides for the reciprocal enforcement of orders for maintenance

or aliment within England, Scotland and Northern Ireland²⁹. None the less, some hardship remains and we recommend that provision should be made, on the same lines as the Maintenance Orders (Facilities for Enforcement) Act, 1920, and the Maintenance Orders Act, 1950, to facilitate the enforcement in other Commonwealth countries of orders for aliment made by the Scottish courts and the enforcement in Scotland of orders for maintenance made by the courts of those countries³⁰.

(2) EVIDENCE

Admissibility of previous findings

989. The rule of evidence as to the admissibility of previous findings is the same in Scotland as it is in England (see paragraph 929). We consider, therefore, that the recommendations which we have made in paragraphs 931-932 for England should apply also to Scotland and we recommend accordingly.

(3) THE LORD ADVOCATE

Appeals at public expense on points of law of exceptional public interest

990. Under Section 8 of the Conjugal Rights (Scotland) Amendment Act, 1861, it is competent for the Lord Advocate to enter appearance as a party in any action of divorce or nullity of marriage and to lead such proof and maintain such pleas as he may consider warranted by the circumstances. Moreover, whenever the court considers it necessary for the proper disposal of any such action, it may adjourn the case and direct that it be laid before the Lord Advocate for him to decide after investigation whether he should enter an appearance. The occasions on which the Lord Advocate has exercised this right to intervene have been rare and have, we understand, come about where he has received information which leads him to suspect that the court is being deceived³¹. It has not been the practice³² in Scotland for the court to ask the Lord Advocate to appear before it to argue a point of law, as it is in England for the court to ask for the assistance of the Queen's Proctor (see paragraph 961).

991. If a point of law of exceptional public interest arises in the course of a consistorial action, it would seem that there is no procedure whereby the Lord Advocate or any other person can bring the point before a higher court for review. Although the occasion may rarely present itself, yet for the reasons we have given in relation to England we think it desirable that there should be some means whereby such points could be brought before a higher court for an authoritative decision, should the need arise. We recommend, therefore, that the same powers as those which we are recommending should be given to the Queen's Proctor in England (see paragraph 968) should in respect of consistorial actions in Scotland be conferred on the Lord Advocate.

²⁹ This Act itself involves a breach in the principle that a litigant must sue in the court of the defender. A further inroad was made by Section 2 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, giving the Court of Session jurisdiction in a divorce action by a wife on the basis of three years' residence in Scotland.

³⁰ Our recommendation in paragraph 1113 should apply to provisional orders confirmed in Scotland.

³¹ The last intervention was in the case of *Riddell v. Riddell*, 1952 S.C. 475, on the ground of collusion.

³² In *Bell v. Bell*, 1941 S.C. (H.L.) 5, the House of Lords asked the Lord Advocate to assist by the citation of authorities and the raising of such arguments as might be relevant.

PART XIV

MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

THE MATRIMONIAL JURISDICTION OF MAGISTRATES' COURTS

Historical background

992. As early as 1858 some jurisdiction in matrimonial matters was given to magistrates' courts in England and Wales in as much as they were given power (under Section 21 of the Matrimonial Causes Act, 1857) to order that property acquired by a wife after she had been deserted by her husband should be her separate property. Power to make separation and maintenance orders came later : under the Matrimonial Causes Act, 1878, a magistrates' court which had convicted a husband of an aggravated assault on his wife was empowered to make orders of non-cohabitation (i.e., separation orders), maintenance and custody of the children ; subsequently, the Married Women (Maintenance in Case of Desertion) Act, 1886, gave a magistrates' court power to make a maintenance order where the husband had wilfully neglected to maintain his wife and had deserted her.

993. The provisions of the Acts of 1878 and 1886 were repealed and in substance re-enacted by the Summary Jurisdiction (Married Women) Act, 1895. This Act extended the grounds of application by a married woman and is the foundation of the jurisdiction of magistrates' courts in matrimonial matters today. It has been amended by a number of subsequent Acts to which we refer later. While the legislation has been essentially designed to afford relief for wives, limited provision has been made for the extension to husbands of the relief available to wives.

Retention of matrimonial jurisdiction

994. We had first to consider if magistrates' courts in England and Wales should continue to exercise jurisdiction in matrimonial matters.

995. The Gorell Commission, which was specifically enjoined by its terms of reference to inquire into the "present state of the law and the administration thereof in . . . applications for separation orders", came to the conclusion that, where the cases were dealt with by lay magistrates, the general administration of the law was unsatisfactory. They considered that it was not desirable "to leave the administration of powers, which may produce the practical though not the legal dissolution of the tie of marriage, to courts whose duties and experience are mainly confined to dealing with petty offences". They recognised, however, that it would not be possible to abolish the matrimonial jurisdiction of magistrates' courts, since those courts provided the only relief which was within the reach of many ill-treated wives, but they recommended that the exercise of the jurisdiction should be limited and that magistrates' courts should have no power to make orders having the permanent effect of a decree of judicial separation (see paragraph 1034).

996. We think it right to point out that conditions have changed since the time of the Gorell Commission's Report. As we later explain, the effect of the Summary Procedure (Domestic Proceedings) Act, 1937, was

to put matrimonial cases on a different footing from other cases. Moreover, the services of probation officers in trying, often successfully, to bring about reconciliations in matrimonial disputes are much more widely used today. In our opinion, therefore, it would not be justifiable to apply the strictures of the Gorell Commission to the handling of matrimonial cases in magistrates' courts under present-day conditions.

997. We had, however, some evidence before us that magistrates' courts are not a suitable tribunal for dealing with matrimonial cases and that their matrimonial jurisdiction should be transferred to the county courts (or to special "Family Courts"). It was argued that this is a difficult jurisdiction which lay magistrates are not best suited to handle; that there is still a police court atmosphere; and that there is prejudice against husbands. These criticisms were not shared by the majority of our witnesses. On the contrary, the view of the majority was that magistrates' courts are well suited for finding the facts in the types of matrimonial case with which they have to deal; that they have developed a simple, cheap and efficient procedure for obtaining and enforcing orders; and that the participation of lay magistrates in the administration of the law keeps it in touch with human needs. We agree with these views and consider that magistrates' courts should continue to exercise jurisdiction in matrimonial matters.

998. We received a large number of suggestions relating to matrimonial proceedings in magistrates' courts. We have examined each of these but it would be impracticable to set out all those that we have not been able to accept. In our examination we have kept in mind that the merit of magistrates' courts is that they provide immediate relief, and provide it at little or no cost to the applicant. If these benefits are not to be lost, it is essential that the procedure should be kept simple. Moreover, it would also in our opinion be unwise to try to provide for every conceivable case of hardship which may arise.

Matrimonial jurisdiction in Scotland

999. Magistrates' courts in Scotland have no matrimonial jurisdiction. We have received no proposals that such jurisdiction should be conferred on them and the remaining sections of this part deal only with the matrimonial jurisdiction of magistrates' courts in England and Wales.

THE RELIEF PROVIDED BY MAGISTRATES' COURTS

THE PRESENT POSITION

Grounds of application

1000. A wife may apply for an order or orders (as described in paragraph 1002) on the following grounds:

- (a) that her husband has been convicted summarily of an aggravated assault upon her within the meaning of Section 43 of the Offences against the Person Act, 1861;
- (b) that her husband has been convicted on indictment of an assault upon her and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months;
- (c) that her husband has deserted her;
- (d) that her husband has been guilty of persistent cruelty to her;

- (e) that her husband has been guilty of wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain ;
- (f) that her husband is a habitual drunkard or taker of drugs ;
- (g) that her husband has been guilty of persistent cruelty to her children ;
- (h) that her husband while suffering from a venereal disease, and knowing that he was so suffering, insisted on having sexual intercourse with her ;
- (i) that her husband has compelled her to submit herself to prostitution ;
- (j) that her husband has been guilty of adultery.

The first five grounds are contained in the Act of 1895. The ground of habitual drunkenness was added by the Licensing Act, 1902, and its extension to drug addiction was provided by the Summary Jurisdiction (Separation and Maintenance) Act, 1925. This latter Act also added grounds (g), (h) and (i). Adultery was not a ground of application until the Matrimonial Causes Act, 1937, came into force.

1001. A husband may apply for an order or orders (as described in paragraphs 1004–1005) on the following grounds :

- (a) that his wife is a habitual drunkard or taker of drugs ;
- (b) that she has been guilty of persistent cruelty to his children ;
- (c) that she has committed adultery.

These grounds were made available to a husband at the same time as they were made available to a wife¹.

Types of order which may be made

1002. On an application by a wife on any of the grounds specified in paragraph 1000, a magistrates' court may make an order or orders containing all or any of the following provisions:

- (a) A provision that the applicant be no longer bound to cohabit with her husband. This provision, while in force, has the effect in all respects of a decree of judicial separation. (This is known as a "separation order".)
- (b) A provision that the legal custody of any children of the marriage while under the age of sixteen years be given to the applicant.
- (c) A provision that the husband pay to his wife such weekly sum not exceeding £5 as the court, having regard to the means both of the husband and of the wife, considers reasonable. (This is known as a "maintenance order".) In addition, if the wife is given the legal custody of any children of the marriage, the husband may be ordered to pay a weekly sum not exceeding £1 10s. for the maintenance of each child. (This order may be continued after the child has reached the age of sixteen, if he or she is engaged in a course of education or training.)

The court also has power to make orders as to costs (see Section 55, Magistrates' Courts Act, 1952).

¹ A Private Member's Bill, introduced in 1922, had sought to give husband and wife equal rights in respect of relief in magistrates' courts but this Bill was dropped on the promise by the Government to introduce a Bill of more limited scope—a Bill which subsequently became the Summary Jurisdiction (Separation and Maintenance) Act, 1925.

1003. Under the Act of 1895, the maximum weekly amount which might be ordered for the maintenance of a wife was £2. There was no provision for separate maintenance of a child until the Married Women (Maintenance) Act, 1920, allowed the court, if it gave the legal custody of any children of the marriage to the wife, to include a provision that the husband pay a weekly sum not exceeding 10s. for the maintenance of each child up to the age of sixteen. As a result of recommendations by the Denning Committee, the weekly amount that might be ordered for the maintenance of a wife was raised from £2 to £5 and for a child from 10s. to £1 10s., by the Married Women (Maintenance) Act, 1949. Provision was also made by this Act for an order in respect of a child to be continued after the age of sixteen.

1004. On an application by a husband on the ground of his wife's habitual drunkenness (or drug-taking) or adultery, it is provided (by Section 5 (2) of the Licensing Act, 1902, and Section 11 (2) of the Matrimonial Causes Act, 1937) that the court may make one or more orders containing all or any of the following provisions:

- (a) a provision that the husband be no longer bound to cohabit with his wife (i.e., a separation order);
- (b) a provision for the legal custody of any children of the marriage;
- (c) a provision that the husband pay to the wife such weekly sum not exceeding £2 as the court, having regard to the means of the husband and the wife, considers reasonable.

1005. The ground of his wife's persistent cruelty to his children was made available to a husband, in the Act of 1925, in the following terms:

"Amongst the grounds on which a married man may apply for an order or orders under the principal Act [i.e., the Act of 1895] there shall be included the ground that his wife has been guilty of persistent cruelty to his children."

It would seem, therefore, that when this is the ground of the husband's application the court has no power to order him to pay his wife maintenance.

1006. It may be noted that:

- (i) If the husband is the applicant the court may award custody of the children to the wife, but if the wife is the applicant it has no power to give custody to the husband. If, however, in proceedings brought by the husband the wife is given custody (and this sometimes happens if the husband is applying on the ground of his wife's adultery), there is no provision to order him to pay maintenance for the children under the Summary Jurisdiction (Separation and Maintenance) Acts. (It is, of course, open to the wife to make a separate application for custody and maintenance under the Guardianship of Infants Acts.)
- (ii) There is no provision for making a maintenance order in the husband's favour nor is there any provision for payment of maintenance for the children by the wife if her husband has been given their custody.

Conditions governing the making of orders

1007. Although in the statute the words "may make an order" are used, the discretion of the court is not an absolute but a judicial discretion, to be exercised in accordance with the rules of law. Consequently, if all the requisite facts are proved the order asked for must be made unless there is some compelling reason to the contrary².

² *Dawson v. Dawson* (1929), 93 J.P. 187.

1008. No order will be made by the court on a wife's application if it is proved that she has committed adultery, unless it is shown that the husband has condoned or connived at, or by his wilful neglect or misconduct conduced to, the adultery (Section 6 of the Act of 1895). Moreover, no order for maintenance will be made against a husband while the wife is in desertion, since his obligation to support her is then suspended.

1009. On an application by either spouse on the ground of adultery, the court is not to make an order unless it is satisfied that the applicant has not condoned or connived at, or by his or her wilful neglect or misconduct conduced to, the adultery, and that the application is not made or prosecuted in collusion with the other spouse or any person with whom it is alleged that the adultery has been committed (Section 11 (3), Matrimonial Causes Act, 1937).

Variation, discharge, lapsing and revival of orders

1010. On an application by either spouse a magistrates' court may, upon cause being shown upon fresh evidence, alter, vary or discharge any order (Section 7 of the Act of 1895). Fresh evidence is not, however, required if all that is sought is to increase or decrease the amount of a weekly payment under a maintenance order (Section 9, Money Payments (Justices Procedure) Act, 1935). There is also power to revive an order which has been discharged or has lapsed (Section 53, Magistrates' Courts Act, 1952, which has replaced Section 30 (3), Criminal Justice Administration Act, 1914)³.

1011. "Fresh evidence" means evidence of something which has happened since the order was made, or which has become known to the applicant since the order was made and which he could not reasonably have been expected to know at the time of the order⁴. The question of what would constitute fresh evidence to justify the discharge of a separation order has been considered on several occasions but the circumstances in which an application would be granted cannot be said to be clearly defined as yet. It would seem, however, that if the spouse against whom a separation order has been made can satisfy the court that there is no longer need for the protection afforded by the order, the court may regard this as sufficient fresh evidence⁵.

1012. Three matters relating to the discharge or lapsing of orders require special mention. These are :

- (1) the effect of the wife's adultery ;
- (2) the effect of continued cohabitation (or residence), or of a resumption of cohabitation ; and
- (3) the effect of divorce.

(1) THE WIFE'S ADULTERY

1013. If the wife commits adultery after she has obtained an order, the husband is entitled to have the order discharged upon proof of the adultery, but the court may refuse to discharge it if the adultery has been conduced to by the husband's wilful neglect to keep up the payments ordered (Section 7 of the Act of 1895, as amended by Section 2 of the Act of 1925). If the

³ See *Pratt v. Pratt* (1927), 43 T.L.R. 523, and *Markham v. Markham* (1947), 63 T.L.R. 91, for the circumstances in which revival has been held to be justified.

⁴ *Johnson v. Johnson*, [1900] P. 19; followed in *Timmins v. Timmins*, [1919] P. 75, per Hill J. at p. 80.

⁵ See the observations of Lord Merriman P. in *Bottoms v. Bottoms*, [1951] P. 424, and *Haynes v. Haynes*, [1952] P. 272.

order is discharged, the court may make a new order that the wife shall continue to have the legal custody of the children of the marriage, and that the husband shall pay a sum not exceeding £1 10s. per week for the maintenance of each child until the age of sixteen. In making such an order the court is enjoined to have regard primarily to the interests of the children.

(2) RESIDENCE AND COHABITATION

1014. Under the Act of 1895, a wife was unable to obtain a maintenance order on the ground of her husband's cruelty or wilful neglect to provide reasonable maintenance until she had left her husband. This condition resulted in hardship, since quite often a wife might be unable to leave the home because she had no means with which to support herself. Accordingly, the law was amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925. This Act provides that a wife may apply for an order while she is still living with her husband (Section 1 (1)). However, the husband need not make any payments under the order so long as the wife resides with him, and the order lapses if she continues to reside with him for more than three months after it was made (Section 1 (4)).

1015. The meaning of the term "resides with" has caused some difficulty. Until 1948, it was considered that a wife who continued to live under the same roof as her husband was not "residing with" him if she ceased to perform any wifely duties for him and, in effect, set up a separate household under the same roof. Consequently, in such circumstances the husband was held to be liable to make payments under an order; if he failed to do so, his wife could enforce the order. In 1948, however, in the case of *Evans*⁶, the court rejected this interpretation and held that "resides with" means "living in the same house with". Accordingly, the present position is that a husband is under no liability to pay under an order if his wife continues to live under the same roof, notwithstanding that he and his wife are living in separate households; and the order lapses after three months of continued residence.

1016. The position is, however, different if a wife who was living apart from her husband when she obtained her maintenance order subsequently returns to her husband's house. If she returns, for instance as a tenant, her order is enforceable⁷. It is only if she resumes cohabitation with her husband that her order lapses (under Section 2 (2) of the Act of 1925). It would seem that this also applies if a wife leaves her husband's house within three months of obtaining her order (so that it becomes effective) and subsequently has to return to live under his roof⁸.

(3) DIVORCE

1017. A maintenance order obtained by a wife in a magistrates' court remains effective if the wife subsequently obtains a divorce⁹. She cannot apply to the Divorce Division for another order while her first order remains in existence¹⁰, but must elect between relying on the magistrates' court order

⁶ *Evans v. Evans*, [1948] 1 K.B. 175. This decision was disapproved of by Denning L.J. in *Hopes v. Hopes*, [1949] P. 227, but subsequently confirmed by the Divisional Court in *Wheatley v. Wheatley*, [1950] 1 K.B. 39; see also *Curtin v. Curtin*, [1952] 2 Q.B. 552, and *Harris v. Harris*, [1952] W.N. 83.

⁷ *Thomas v. Thomas*, [1948] 2 K.B. 294.

⁸ In *Hewitt v. Hewitt*, [1952] 2 Q.B. 627, a husband left the house within three months of a maintenance order being made against him; later he returned to live in the house and it was held that his wife's order remained effective, unless they resumed cohabitation.

⁹ *Bragg v. Bragg*, [1925] P. 20.

¹⁰ *Kilford v. Kilford*, [1947] P. 100.

or having it discharged and then applying to the Divorce Division for an order. If the husband obtains a divorce it is open to him to apply for the discharge of the order, which remains effective until he does so.

PROPOSALS AND RECOMMENDATIONS

1018. We have received a large number of suggestions for amendment of what is usually termed the substantive law governing matrimonial proceedings in magistrates' courts. Some are designed to extend the power of the court to provide for cases of hardship which arise at present ; others are intended to fill in gaps or remove anomalies in the existing law. Since legislation in this field has been largely piecemeal, it is hardly surprising that there are gaps and anomalies. In making recommendations, we have sought in general to make the law more uniform, without, however, a pedantic insistence on tidiness for tidiness' sake. In this connection, we wish to draw attention to the fact that, although the procedural law has now been consolidated in the Magistrates' Courts Act, 1952, the substantive law remains scattered over the Statute book (as will be seen from the references to the various Acts in the preceding paragraphs). We agree with the view expressed by several witnesses that the time is now ripe for a consolidation of the various statutory provisions and we therefore recommend that the substantive law with regard to the jurisdiction and powers of magistrates' courts should be codified.

1019. We now deal with the various proposals which were put to us, firstly, with regard to the right of application for relief, and secondly, with regard to the orders which can be made.

Application for relief

(1) RELIEF AVAILABLE TO A HUSBAND

1020. The Gorell Commission thought it right that the relief available to a husband in magistrates' courts should be substantially the same as that available to a wife¹¹. This principle was supported by a number of our witnesses. We endorse it ; our recommendations in the remainder of this part should therefore apply whether the husband or the wife is asking for an order. We do not think that in practice there will be a significant increase in the number of applications made by husbands, but relief should be available if it is needed.

1021. We have already recommended that a husband should be able to apply to a magistrates' court for a maintenance order against his wife if he is destitute and unable to support himself, and his wife has means more than reasonably sufficient for her own support (see paragraph 500).

1022. We have also recommended that a husband should be able to apply for an order against his wife for the maintenance of the children (see paragraphs 567-568).

1023. We further recommend that, in addition to the grounds on which a husband may at present apply for an order or orders (see paragraph 1001), he should also be able to apply if:

- (i) his wife has been convicted summarily of an aggravated assault upon him within the meaning of Section 43 of the Offences against the Person Act, 1861 ;

¹¹ Cd. 6478, paragraph 158.

- (ii) his wife has been convicted on indictment of an assault upon him and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months ;
- (iii) his wife has deserted him ;
- (iv) his wife has been guilty of persistent cruelty to him ;
- (v) his wife has a venereal disease and, knowing this, permits intercourse, and he is ignorant of the fact.

1024. We do not accept the suggestion that a wife's wilful neglect of her household duties should be a ground of application. It would be difficult to determine what should be regarded as constituting "wilful neglect" and the ground would be open to abuse by a husband who sought to rid himself of his obligations to his wife.

(2) RESTRICTION ON APPLICATIONS FOR ORDERS

1025. There is a general time-limit for the starting of proceedings in magistrates' courts. This is six months from the date on which the cause of complaint arose. Since desertion and wilful neglect to maintain are continuing offences, the applicant may issue her summons on these grounds even if the desertion or wilful neglect to maintain started more than six months previously. Regulation 17E of the Defence (Administration of Justice) Regulations removed the six months' time-limit in the case of adultery if, during the six months, the applicant was serving outside the United Kingdom in H.M. Forces or as a member of the crew of a British ship, provided that the application was made promptly after the applicant's return. This regulation has now been given permanent effect by Section 1 of the Emergency Laws (Miscellaneous Provisions) Act, 1953.

1026. We think that the present time-limit may operate unfairly in other cases in which a spouse has committed adultery ; for instance, a husband may be working away from home and his wife may not learn of his adultery until more than six months have elapsed from its taking place. We recommend, therefore, that, instead, proceedings should have to be taken within six months from the date on which the adultery first became known to the complainant.

(3) GROUNDS OF APPLICATION FOR ORDERS

1027. We think that with the exception of habitual drunkenness, with which we deal below, the present grounds of application are satisfactory. It was suggested to us that it is unreasonable to require a woman to establish "persistent" cruelty and that the ground should be simply "cruelty". We can see no advantage in making this change, since the interpretation of the ground appears to be giving no difficulty ; and, if the change were made, there would, in our opinion, be some danger that orders would be obtained in circumstances in which relief was not really justified. We are, however, proposing that an additional ground of relief should be provided, namely, conviction for a sexual offence against a child.

The definition of habitual drunkard or drug-taker

1028. To obtain an order on the ground that the other spouse is an habitual drunkard or taker of drugs, the definition in Section 3 of the Habitual Drunkards Act, 1879, must be satisfied. This definition is:

" 'Habitual drunkard' means a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor [or the habitual taking or

using, except upon medical advice, of opium or other dangerous drugs within the meaning of the Dangerous Drugs Acts, 1920 and 1923]¹², at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs.”

We consider that this test is too stringent and we recommend that the definition should be widened to include the case of the man or woman who by reason of constant drinking or drug-taking renders life intolerable to his or her spouse. The Gorell Commission received evidence that the statutory definition had proved unsatisfactory and recommended an extension on the lines of our suggestion¹³.

Conviction for a sexual offence against a child

1029. We recommend that conviction for a sexual offence by one spouse against a child of either or both spouses, or a child living in family with them, should be an additional ground for obtaining an order or orders in a magistrates' court.

1030. We have explained in paragraph 84 why we think that conviction for a sexual offence against a child should not in itself constitute a ground of divorce. There is, however, a very real problem for which we are satisfied that some solution should be found. The wife of a man who has been convicted of such an offence may be in a difficult position if she wishes to protect the children on his release from prison, when as a rule he will naturally want to return home. It is not certain that she will be able to obtain a separation order under the existing law, since it may be impossible to establish that his conduct has amounted to persistent cruelty to her (or to the child). For instance, she may not be able to prove that her health has been affected; or the offence of which he has been convicted may be the only one he has committed, so that it cannot be held that there has been “persistent” cruelty. We think it desirable, therefore, that such conduct should be made a separate ground of application in a magistrates' court, in order to make certain that a wife is able to secure protection for the children.

1031. We recognise that it would not be right for a wife to be entitled to rely for the rest of her life on an order made primarily in the interests of the children. The recommendation in paragraph 1037 meets this difficulty.

(4) BARS TO THE MAKING OF ORDERS

1032. As we have explained in paragraph 1009, it has been expressly provided that condonation, connivance, collusion and conduct condoning are bars to the making of an order on the ground of adultery. We think that it would be advisable to establish that these matters should, in so far as they are appropriate, constitute bars to the making of an order on an application made on any of the grounds, and we recommend accordingly.

Orders which may be made

(1) SEPARATION ORDERS

1033. As we have explained, a separation order contains a provision that the spouse who has obtained it shall no longer be bound to cohabit with the other spouse. It has the same effect as a decree of judicial separation. Thus, if a spouse is in desertion when a separation order is made against him, the

¹² The words in square brackets were added by Section 3 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925.

¹³ Cd. 6478, paragraph 156.

desertion then ceases to run. At first the courts made separation orders as a matter of course but the High Court decided that the Act of 1895 did not require this and considered that their use should be restricted¹⁴. The Gorell Commission urged that they should be made only when they were necessary to ensure the safety of the wife and that they should not be made on the ground of desertion or wilful neglect to maintain. We understand that the present practice of the courts is to make separation orders only when they are asked for by the wife and then only when they are necessary for her protection. If they are lightly made the High Court will strike them out on appeal.

1034. The Gorell Commission, holding that the functions of magistrates' courts should be disciplinary and reformatory, considered that they should have no power to make orders having the permanent effect of a decree of judicial separation; if permanent separation orders were needed, it was for the High Court to make them. Accordingly, the Gorell Commission recommended that:

- (a) separation orders made by magistrates' courts should last only for two years at the most; and
- (b) a magistrates' court should be able to discharge an order if it was satisfied that the spouse who had obtained it ought to give the other spouse a second chance.

1035. Some of our witnesses criticised the permanent effect of separation orders on the ground that it is wrong that the spouse who has obtained the order should be able to refuse a genuine offer of repentance by the other spouse and at the same time be able to keep that spouse tied for life: the refusal of the innocent spouse to follow up the order by taking divorce proceedings often led to the forming of illicit unions and the birth of illegitimate children. The suggestions put forward were on the lines of the Gorell Commission's proposals.

1036. We do not think that it would be right to set a limit to the duration of separation orders. If a separation order lapsed automatically after a specified period the injured spouse would be deprived of that reasonable security to which in our opinion he or she is entitled. Such a spouse should not be forced to take proceedings in the High Court in order to secure protection. We have also rejected an alternative proposal which was put to us, namely, that at the end of a specified period a separation order should be automatically reviewed by a magistrates' court. This would add unnecessarily to the burden of work on magistrates' courts, since in many, if not most, cases the order would be extended.

1037. We see force in the argument that a separation order may bear hardly on the spouse against whom it was made. So long as the order is in existence the spouse holding it can keep the other spouse at arm's length, however sincere his overtures may be, and can continue to rely on any provision for maintenance contained in it. Accordingly, we recommend, four members dissenting¹⁵, that a magistrates' court should have power to discharge a separation order on the application of the spouse against whom it was made, if twelve months or more have elapsed from the making of the order and the court is satisfied that it is no longer reasonable to keep it in force¹⁶.

¹⁴ *Dodd v. Dodd*, [1906] P. 189, approved by the Court of Appeal in *Harriman v. Harriman*, [1909] P. 123.

¹⁵ Mrs. Allen, Mrs. Brace, Mr. Maddocks and Mr. Young dissent from this recommendation except in so far as it applies to a separation order made on the proposed new ground of a spouse's conviction for a sexual offence against a child (see paragraphs 1029–1031).

¹⁶ It may be that under the present law the court has this power (see paragraph 1011).

1038. A separation order obtained by a wife usually contains a provision for maintenance. We do not suggest that, if the court discharges the separation order, it should be bound to discharge at the same time any provision for maintenance; it is better that it should be left to the discretion of the court to deal as it thinks fit with any such provision.

1039. If the ground on which a separation order was obtained is one which is also a ground of divorce (or judicial separation), we contemplate that it would still be open to the spouse who obtained the order to bring proceedings in the High Court for divorce (or judicial separation) based on that ground, notwithstanding that a magistrates' court has discharged the order.

(2) ORDERS FOR MAINTENANCE

The husband's liability where the wife is residing, but not cohabiting, with her husband

1040. As we have explained in paragraph 1015, since the decision in *Evans* a wife cannot enforce a maintenance order if she continues to live under the same roof with her husband, even though she has set up a separate household under that roof. A number of witnesses pointed out that in consequence the wife's position may be very difficult. In present circumstances it may be impossible for her to find somewhere else to live especially if she has young children; to set up a separate household under the same roof may be the only practicable solution. These witnesses advocated a return to the law as it was interpreted by the courts before the decision in *Evans*.

1041. We accept that the present interpretation of the expression "resides" in Section 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, may result in hardship. It also seems to us that the present position is anomalous (see paragraph 1016). We accordingly recommend that where a wife has set up a separate household under the same roof as her husband, he should be liable to make payments under any order for maintenance which she has obtained, and the order should be enforceable¹⁷.

The husband's liability where the wife is cohabiting with her husband

1042. Some witnesses suggested that if a wife's only complaint against her husband is that of wilful neglect to provide reasonable maintenance for her or her children, she should be able to obtain an order which should be fully effective notwithstanding that she and her husband continue to live together as man and wife. They pointed out that a husband's neglect to provide for his wife may not be deliberate or malicious but may be due rather to thoughtlessness or improvidence and that the existence of an effective court order may then be sufficient to keep him up to the mark. As it is, however, the wife must leave her husband if she wishes to retain her order and thus marriages may be broken which might otherwise be saved; in fact, it may be said that the present law positively encourages the breaking up of the home where the sole or the main cause of the trouble is financial.

1043. Against this proposal it was argued that the existence of an effective order could only further exacerbate relations which were already strained, to the point where the final breakdown of the marriage would be inevitable. Moreover, it was said that the proposal would be impracticable. The amount of the order is based on what the wife requires to keep herself when living

¹⁷ It would seem that this is already the position where the wife has obtained a maintenance order from the Divorce Division under Section 23 of the Matrimonial Causes Act, 1950—see *In re Caras*, [1955] 1 C.L. 288.

apart from her husband. If husband and wife were in fact living together, then the husband could argue that he was being asked to pay too much since he was providing her with a home; on the other hand, she might say that she was not getting enough under the order since she was expected to meet all the housekeeping expenses out of a sum intended for her own needs.

1044. Other witnesses were concerned more with the status of the wife in the home. It was said that a wife should not be dependent on the whim of her husband for the amount which he allows her for housekeeping; every wife should have a right to a housekeeping allowance. Some of these witnesses proposed that the amount should be fixed by law as a certain proportion of the family income; others considered that the wife should be able to apply to the court for an order fixing the amount¹⁸. These proposals we are unable to accept. The first would be clearly impracticable. The second would require the court in effect to determine the standard of living of the family.

1045. We are impressed, however, by the argument that the present law fails to make any provision for the case where the wife has constant difficulty in getting money from her husband but at the same time does not want to break up the home. We have been told that in fact quite often a wife who has obtained a maintenance order does not leave her husband and that the situation improves because he, not realising that her order is unenforceable, makes her regular payments. We therefore think that it would be desirable to allow a wife who has obtained a maintenance order solely on the ground of her husband's wilful neglect to provide reasonable maintenance for her (or for the children) to be able to enforce that order without leaving her husband.

1046. We have carefully considered the arguments advanced against this proposal but in our opinion their force has been exaggerated. If relations between husband and wife are already seriously strained, we think it unlikely that the fact that the wife has obtained a court order which is enforceable will make matters any worse. But where the situation has not gone so far we believe that in some cases at least there is reasonable hope that the making of an order may bring the husband to his senses. Moreover, the very fact that the court has power to make such an order may in itself have a salutary effect on those husbands who are apt to be careless of their financial responsibility for their families. We are encouraged in this view by evidence we received of experience in New Zealand, where there is no provision that a wife must leave her husband if she wishes to keep her order¹⁹.

1047. As to the practical difficulty referred to in paragraph 1043, we feel confident that it is not insuperable. If the wife wishes to go on living with her husband we see no reason why the court, when assessing the amount of the order, should not take into account the fact that the husband is paying the rent. At the same time the court could point out to the husband that if he expects his wife to run his household he must pay her a sum over and above that specified in the order. If the wife subsequently left her husband she could apply for an increase in the amount of the order to meet the cost of providing accommodation for herself.

1048. A point which has given us more concern is that it would be possible for a husband who failed to pay under the order to be committed to prison, at his wife's instigation, while they were living together as man and wife.

¹⁸ This proposal also appeared in the Women's Disabilities Bill, 1952. It was replaced in the Women's Disabilities Bill, 1953, by the proposal in paragraph 1042.

¹⁹ See Supplementary Note submitted by Mr. Justice Finlay, Paper No. 124, Minutes of Evidence, Fortieth Day.

We consider, however, that in practice this would rarely happen. If the husband deliberately persists in flouting the order, it is likely that this would result in his wife withdrawing from cohabitation before matters reached the stage of his being sent to prison.

1049. We recommend, therefore, with one dissentient²⁰, that if a wife obtains an order on the ground of her husband's wilful neglect to provide reasonable maintenance for her (or the children), her husband should be liable to make payments under the order, and it should be enforceable, notwithstanding that husband and wife are living together in circumstances amounting to full cohabitation. It should, however, be open to the husband to apply to the court at any time for the order to be discharged on the ground that the circumstances are such as to warrant its discontinuance. As a consequence of our recommendation, an order made on the ground of wilful neglect to maintain should not automatically lapse (as it does under the present law) if husband and wife resume cohabitation after living apart.

1050. As we explain (in paragraph 1087), as a general rule payments under a maintenance order must now be made to the court collecting officer. If husband and wife continue to live together, it would usually be undesirable for the husband to have to pay the money to the court. We recommend, therefore, that in such a case the court should order that payment be made direct to the wife, unless it considers that, in the particular circumstances, it would be preferable that payment should be made to the court collecting officer.

The husband's liability where the wife leaves the United Kingdom

1051. If a wife who has obtained a maintenance order subsequently leaves the United Kingdom, she can still enforce her order, if her husband does not keep up the payments, because she can ask the court collecting officer to take proceedings on her behalf. The husband, however, is unable to apply for the order to be varied or discharged because it is not possible to serve a summons on the wife. In any case, he would often be unable to find out if the circumstances in which his wife was living justified his asking for variation or discharge of the order.

1052. It is plain that the husband's position is unsatisfactory under the present law. It may be quite unreasonable for the wife to continue to rely on her order; for instance, she may now have ample means of her own or she may be living with another man. We understand that in practice the courts have taken a commonsense view when enforcement proceedings have been brought by a wife who is living outside the United Kingdom. Nevertheless, at law the husband is under a disability. We accordingly recommend that, if a wife who has obtained a maintenance order leaves the United Kingdom, after one calendar month the husband's liability to make payments should be suspended for so long as she stays away; if she remains out of the United Kingdom for more than six calendar months from the end of the period of one month, the husband should be able to apply to the court for the order to be discharged and the court should have power to discharge it if it considers this reasonable in all the circumstances. The court should give the wife notice of the application by registered letter to her last known address. We have fixed a period of one month to allow a wife to leave the country for a short time on holiday or business. It may be, however, that it would sometimes be reasonable that she should be given a longer period and we therefore recommend that the wife should be able

²⁰ Sir Frederick Burrows, whose views are set out at p. 343.

to apply to the court for an extension of time. If an extension is allowed, the husband should not be able to apply for the order to be discharged until six months from the end of the extended period.

1053. We intend our recommendations to apply also to maintenance orders made by the High Court which, in accordance with our recommendation in paragraph 582, have been registered in a magistrates' court.

Maintenance for a wife against whom a separation order has been made

1054. We recommend that if a husband has obtained a separation order against his wife, the court should have power to order that he should pay her maintenance to an amount not exceeding £5 weekly. As we have pointed out, the maximum which the court can at present award in these circumstances is £2. We see no good reason why the maximum should be lower than the maximum of £5 which the court can award when the wife is the applicant for matrimonial relief. Further, we consider that it should be made clear that the court can order maintenance for the wife whatever the ground on which the husband has obtained a separation order (see paragraphs 1004 and 1005).

Maintenance for children

1055. We have dealt in Part V with our recommendations relating to orders for the custody of children in matrimonial proceedings in magistrates' courts. We have there recommended that a magistrates' court should have power to award custody of a child to either parent or to a third party (including a power to require a local authority to receive a child into its care), where an application for custody is made in the course of matrimonial proceedings (see paragraphs 410–411). We now recommend (in accordance with the general principle we have laid down in paragraph 568) that the court should have power to order the husband or the wife or both of them, as may be appropriate, to pay maintenance for the children.

Discharge of a maintenance order on the ground of subsequent adultery

1056. The court has been given discretion to refuse to discharge a maintenance order made in favour of a wife when it is proved that she has subsequently committed adultery, if it considers that her adultery has been conducted to by her husband's neglect to keep up the payments under the order (see paragraph 1013). It was suggested to us that it is anomalous that the court has not been given discretion to refuse to discharge the order if the husband has connived at his wife's adultery or if he has been guilty of conduct conducing otherwise than by failure to pay under the order. These matters are bars to the making of an order on the ground of adultery as well as to the greater relief of dissolution of marriage. The Gorell Commission also dealt with this point in its Report; it considered that the court should refuse to discharge the order in such circumstances²¹.

1057. We think that it should be within the court's discretion to refuse to discharge a wife's maintenance order if it considers that the husband has connived at her adultery or that his conduct has in any way conduced to it; and we recommend accordingly. It is by no means inconceivable that a husband might take active steps to put temptation in his wife's way in the hope that she would commit adultery. It may be that such conduct would

²¹ Cd. 6478, paragraph 170. It should be noted that at that time the proviso allowing the court to refuse to discharge the order if the husband failed to keep up the payments had not been introduced.

be held to disentitle the husband from complaining of his wife's adultery²², but we think it preferable that there should be statutory provision. We did indeed consider whether it would not be advisable to make connivance an absolute bar to the discharge of the order but, on the whole, we think it would be better to leave the matter to the court's discretion, so that it can take all the circumstances of the particular case into account. With regard to conduct conducing, we should point out that we do not contemplate that the wife should be able to advance, as conduct conducing to adultery committed by her after obtaining an order, the matrimonial offence of her husband in respect of which she had obtained that order²³.

Lapsing of a maintenance order on re-marriage

1058. We have recommended in Part VII that a husband's liability to pay maintenance to his wife should end on her marrying again. We understand that the present practice is to regard provisions for the custody of the children and for their maintenance contained in a wife's maintenance order as ceasing to have effect if the order is discharged. We therefore recommend that it should be clearly provided that if a maintenance order made by a magistrates' court in favour of a wife lapses on her re-marriage, any provision in the order for custody and maintenance of the children should remain in force unless the court otherwise directs.

Interim orders for maintenance

1059. If the proceedings are adjourned, the court has power to make an interim order for maintenance, which may last for not more than three months from the date on which it was made (Section 6 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925). It seems that an interim order cannot be made once the court has found all the necessary facts proved²⁴.

1060. The Denning Committee suggested that where divorce proceedings are pending a magistrates' court should be able to make an interim order for maintenance which should operate until the making or refusal of a maintenance order by the Divorce Division. The interim order could then in many cases take the place of an order for alimony pending suit and make it unnecessary²⁵. This proposal was supported by several witnesses. It was said that it frequently happens that while proceedings are pending by a wife in a magistrates' court the husband will file a petition for divorce, and thus bar any further consideration of the wife's application by the magistrates' court (see paragraph 1141). It was pointed out that this may leave the wife in a difficult position; she can, of course, apply to the Divorce Division for alimony pending suit, but this takes time, particularly since she may have first of all to apply for legal aid.

1061. We think that it would be useful if in such circumstances a magistrates' court could make an interim order for maintenance. We accordingly recommend that where matrimonial proceedings are pending in the High Court, a magistrates' court should be able to make an interim order for maintenance which should operate until the proceedings have been terminated. In the case of divorce proceedings, by "terminated" we mean the dismissal of the petition or the granting of a decree *nisi* (on the husband's petition) or the making of the decree *nisi* absolute (on the wife's petition).

²² Since the Report was drafted, the Divisional Court has said that the husband must be able to rely on the adultery alleged and that he cannot rely on adultery which he has condoned or at which he has connived (*Marczuk v. Marczuk*, [1955] 3 All E.R. 758).

²³ See *Read v. Read*, [1952] P. 119.

²⁴ *Fulker v. Fulker*, [1936] 3 All E.R. 636.

²⁵ Cmd. 7024, paragraph 45, Final Report.

1062. We would emphasise that, in fairness to the husband, the court should not make such an order automatically. A magistrates' court should not of course attempt to adjudicate on issues which will shortly come before the High Court but in exercising this power it should satisfy itself that in all the circumstances it is reasonable that the wife should be given an interim order for maintenance.

1063. We also recommend that a magistrates' court should have power to make an interim order for maintenance notwithstanding that the court has made up its mind on the facts. No possibility of reconciliation, however slight, should be neglected, and it may well be desirable for husband and wife to have a chance to reconsider their position before the final step of making an order is taken by the magistrates.

(3) A FINDING OF DESERTION

1064. It was suggested to us that a husband should be able to obtain from the court a finding that his wife has deserted him. Until her desertion is established he is not absolved from his liability to maintain her. Moreover, even if her summons against him for desertion is dismissed, the position may be left uncertain because the question of whether or not she had deserted him may not be dealt with. We accept that the husband is at present at some disadvantage. Our recommendation in paragraph 1023 does not remove this, because he may have no occasion to apply to the court for an order and yet may wish to have his wife's desertion established. A deserted wife is not in the same difficulty because she can obtain a maintenance order for a nominal sum. We think that it would, however, be preferable if instead of making a nominal order the court could make a finding of desertion against her husband. We accordingly recommend, with one dissentient²⁶, that either spouse should be able to apply to a magistrates' court for a declaration that the other spouse has deserted him or her.

(4) BINDING OVER

1065. The Gorell Commission suggested that magistrates' courts should be given power to bind over the husband, with or without sureties, to be of good behaviour, in addition to or in lieu of an order for separation²⁷. We think that it would be useful for a magistrates' court to have such a power, in order to afford protection to an ill-treated spouse, but we would put it on a rather broader basis than in the above proposal. We accordingly recommend that if a magistrates' court makes a separation or a maintenance order, it should in addition be able, if it thinks a useful purpose would be served, to bind over either or both spouses, with or without sureties, to be of good behaviour. We further recommend that the court should be able to make such an order where it dismisses the application for a separation or a maintenance order because the ground of complaint is not established. This power would be useful where, for instance, a husband's conduct has not amounted to persistent cruelty but the court is nevertheless satisfied that he has been ill-treating his wife and that she needs some protection. We wish to make it plain, however, that we do not contemplate that under our proposal a magistrates' court should be able to refuse an application for a separation order, and instead make an order binding over the defendant spouse, if the ground of application has been established and the need for a separation order has been shown.

²⁶ Mr. Beloe.

²⁷ Cd. 6478, paragraph 168 (b).

CONSTITUTION OF THE COURT DEALING WITH MATRIMONIAL CASES AND THE CONDITIONS OF HEARING

1066. In 1936, the Departmental Committee on the Social Services in Courts of Summary Jurisdiction made recommendations about the procedure for hearing matrimonial cases in magistrates' courts and about means for promoting reconciliation in such cases²⁸. These recommendations led to the Summary Procedure (Domestic Proceedings) Act, 1937. It was recognised that the ordinary rules for the hearing of cases are not entirely appropriate for matrimonial cases and the Act laid down certain special rules for the trial of domestic proceedings²⁹. With regard to conciliation in matrimonial cases, the effect of the Act was to give statutory recognition to the work carried out by probation officers (since their first appointment in 1907) as conciliators and in making enquiries in matrimonial cases. The Act authorised their employment to undertake conciliation and to make investigations into the means of the parties in any proceedings involving maintenance. This resulted in extended use of the services of probation officers in conciliation work. It is now the general practice for magistrates to ask probation officers to try to bring husband and wife together again in all suitable cases coming before the court.

1067. The Summary Procedure (Domestic Proceedings) Act, 1937, has now been repealed and the substance of its provisions incorporated in Sections 56 to 62 of the Magistrates' Courts Act, 1952.

THE PRESENT POSITION

1068. A court taking domestic proceedings may consist of:

- (i) not more than three justices of the peace, including, so far as is practicable, both a man and a woman, or
- (ii) in London, a metropolitan magistrate sitting alone, or
- (iii) in certain other city or borough areas, a stipendiary magistrate sitting alone.

1069. Metropolitan and stipendiary magistrates may if they wish have lay magistrates sitting with them. In the Act of 1937, there was provision for setting up, by Order in Council, special magistrates' courts in London, expressly to exercise jurisdiction in domestic proceedings. (This provision is now contained in Section 119 (4), Magistrates' Courts Act, 1952.) Recently one such court has been established; at the discretion of the Chief Metropolitan Magistrate, cases may be taken from any part of the metropolitan police court area and from the City of London³⁰; in that court a metropolitan magistrate sits with two lay magistrates, of whom, as far as is practicable, one is a woman.

1070. It is provided that the sittings of magistrates' courts for domestic proceedings should so far as possible be separate from sittings for ordinary business. Some courts set aside a special day or half-day for hearing

²⁸ Cmd. 5122.

²⁹ It should be noted that applications for the enforcement or variation of maintenance orders are not "domestic proceedings" and that consequently the special rules do not apply to such applications (see Section 56 (1), Magistrates' Courts Act, 1952).

³⁰ See the Metropolitan Police Courts (Domestic Proceedings) Orders, 1952 and 1953.

matrimonial cases (or, where facilities are available, a special court may be held in a different part of the building or in a separate building); others hear matrimonial cases at the beginning or the end of the day's list.

1071. The general public are excluded from the hearing of domestic proceedings and the material that can be published in newspaper reports is restricted.

EVIDENCE AND RECOMMENDATIONS

1072. Not all our witnesses were satisfied that the special quality of matrimonial work is sufficiently recognised and a number of suggestions were made designed still further to differentiate between the handling of matrimonial cases and that of other cases dealt with in magistrates' courts. As will be seen, we ourselves consider that the present arrangements are in general satisfactory, save in one important respect, namely, the separation of matrimonial cases from the other business of magistrates' courts.

Constitution of the court

1073. The principal suggestions we received regarding the constitution of courts dealing with matrimonial cases were:

- (i) They should be courts the members of which have undergone special training or, alternatively, have been specially picked for their knowledge and experience (in the same way as the members of juvenile courts are selected).
- (ii) A stipendiary magistrate should not sit alone to hear matrimonial cases, but should always have lay magistrates with him.
- (iii) It should be obligatory for the court to include a woman magistrate.

1074. Against the second suggestion, it was argued that there is no reason why matrimonial cases should be treated differently from other cases regarding the mode of trial. If it is thought advantageous, and is convenient, the attendance of lay magistrates is arranged at the present time. If their attendance were obligatory, it would often be difficult to arrange the work of the courts; it would, for instance, make it very difficult for a stipendiary magistrate, when he had finished his ordinary work, to help (as he does at present) by taking cases from the list of lay magistrates sitting as a matrimonial court on the same day, since other lay magistrates would probably not be available to sit with him.

1075. We think it unnecessary to make any changes in the constitution of courts dealing with matrimonial cases. The present system seems to us to be working well. Even if it were practicable, we doubt whether it would be desirable to arrange for matrimonial cases to be taken by magistrates who have been specially trained or selected. Specialisation has its own risks, and we should not like to see matrimonial courts become courts of "experts". The advantage of a lay bench is that it represents a cross-section of the community. We therefore think that it should be left, as it is at present, to the good sense of the magistrates to make the most suitable arrangements for dealing with their matrimonial work. It is, of course, most desirable that both sexes should be represented in a matrimonial court. We believe that this is in fact usually done, but it would not be practicable to make it obligatory. Nor do we see any reason why stipendiary magistrates should not continue to sit alone when they try matrimonial cases. We had no evidence to suggest that there is any serious dissatisfaction with this arrangement.

Conditions of hearing

1076. It is laid down by statute that, "so far as is consistent with the due dispatch of business", domestic proceedings are to be kept separate from the other work of magistrates' courts.

1077. Our witnesses expressed concern about the present position. From a survey carried out by one body, covering 256 magistrates' courts in England and Wales, it appeared that in only 74 courts was the matrimonial work completely separate from the other business. In more than half of the other courts, not only were matrimonial cases taken in the ordinary list of the court but they were always taken at the end of the day's list³¹. It was said that where matrimonial cases are included in the ordinary list of the court, the parties are obliged to wait in the court building, with criminal business going on around them, until their case is reached; for instance, a wife may have to bring her young children with her (because there is no one with whom she can leave them) and keep them there all day, until her case comes on. It was also said that in such courts the atmosphere generally is not conducive to the proper consideration of matrimonial disputes; moreover, the magistrates are not always capable of giving due attention to matrimonial cases coming before them after a long day spent on criminal business. Witnesses urged that it should become the rule that matrimonial proceedings should be heard in specially arranged matrimonial courts. Some suggested that a special day or half-day should be set aside for matrimonial work; others that a separate room or a separate building should be assigned to the matrimonial court. The Magistrates' Association, while recognising that the present conditions were by no means always satisfactory, drew attention to the difficulties of implementing proposals on these lines over the country as a whole. It suggested that courts should so arrange their lists that the parties would know with greater certainty when their case was likely to be heard.

1078. The General Council of the Bar confined its observations to the London area. We were told that, because of the pressure of work on the metropolitan magistrates, insufficient time may be given to cases, the decisions in which may vitally affect the status and finances of the parties. In matrimonial cases the facts may range over the whole of the married life and the parties and the witnesses may be somewhat incoherent, so that it is essential that ample time be allowed. The adjournments which are now necessary cause protracted hearings lasting over days or weeks, with the consequential loss of time and money to the parties concerned; and with the possibility also that the witnesses' memory may become hazy. It was proposed that metropolitan magistrates be created or assigned to deal specifically with matrimonial cases, so that these could be concentrated into as many courts as were found to be necessary. Solicitors acting for complainants should be required to give some estimate of the length of the hearing so that cases could be tried to a finish from day to day.

1079. On the basis of the evidence we have received, we are of the opinion that, taking the country as a whole, the present arrangements for hearing matrimonial cases are not satisfactory. In our view it is essential that there should be a complete separation of matrimonial business from the other business of the courts. We do not think that the solution lies along the lines of trying to fix times for the hearing of matrimonial cases; and in any event we consider that that would be quite impracticable. We accordingly recommend that steps should be taken to ensure that in all courts the work of hearing domestic proceedings is handled by itself and apart

³¹ See Paper No. 32, Minutes of Evidence, Eleventh Day (National Association of Probation Officers).

from the other work of the courts. This can be done by hearing such cases on a day or a half-day when no other business is taken. Alternatively, where this is feasible, they can be heard in a separate court room or in a different building.

1080. We recognise the difficulties in implementing our recommendation throughout England and Wales. In some country districts the number of matrimonial cases may not seem sufficient to justify setting up a separate matrimonial court, particularly since magistrates may have to travel considerable distances to attend the court house. There may also be a problem in magistrates' courts in large towns; to set aside for matrimonial business one or two afternoons a week, which may not in practice be fully taken up with that business, may seem wasteful of time when the pressure of the court's other business is very heavy. But it is so important for matrimonial cases to be heard under the most suitable conditions that these difficulties must be faced and overcome, if necessary by the provision of more court accommodation or by the appointment of additional magistrates.

Extension of domestic proceedings

1081. It was suggested to us that the scope of domestic proceedings should be enlarged to include applications for the enforcement of maintenance orders and for variation of orders.

1082. We do not think that it would be desirable to make it a rule that applications for the enforcement or variation of maintenance orders must be treated as domestic proceedings. Enforcement is an urgent matter which usually cannot be held over to the next session of a matrimonial court. If the application for enforcement were not held over to the next session and if applications for enforcement were treated as domestic proceedings, it would be necessary to clear the court before the application could be heard. This would usually be inconvenient, and indeed in some areas the court premises are such that to clear the court would mean turning everyone into the street. Further, we see no reason why enforcement should have to be treated as a domestic proceeding, since the matter does not usually bear on the married life of the parties, but simply on the question of why the man has defaulted.

1083. We appreciate that during the hearing of an application for variation of a maintenance order, matters occasionally come out which would be better dealt with in closed court. However, to treat all applications for variation as domestic proceedings, in order to provide for these exceptional cases, would be inadvisable. Often the court allows the husband to make an application for variation, by issue of the necessary summons, during the course of hearing the wife's application for enforcement. To be obliged then to treat the proceedings as domestic proceedings would lead to the difficulties described in paragraph 1082. In our opinion the solution is to give a magistrates' court power to treat an application for variation as a domestic proceeding, if it thinks fit, whether or not the application is made in the course of proceedings for enforcement. We recommend accordingly.

1084. We understand that applications for the discharge of matrimonial orders rank as domestic proceedings. We think that this is right. An application to discharge an order may be sought, for instance, on the ground of the wife's adultery or on the husband's offer to return to live with his wife. It is clearly preferable that matters such as these should always be dealt with under the conditions of domestic proceedings.

Applications courts

1085. It was suggested that all applications for leave to issue a summons should be made to a magistrate sitting as an "applications court", and that the assistance of a probation officer should be available. It was said that

at present the magistrates' clerk (or a member of the staff) sometimes gives leave; if all applications for summonses were taken by a magistrate sitting as an "applications court", there would be an early opportunity to enlist the services of the probation officer to try to bring about a reconciliation.

1086. We recommend that all applications for leave to issue a summons should be made to a magistrate sitting as an "applications court". While we think it most desirable that the services of a probation officer should be available when an application for a summons is dealt with, we are doubtful if it would be practicable to make this a statutory requirement.

ENFORCEMENT OF MAINTENANCE ORDERS

THE PRESENT POSITION

Enforcement in England

1087. Since 1st April, 1953, it has been obligatory for payments under a maintenance order to be made through an officer of the court (the collecting officer) unless the court is satisfied that this would be undesirable. It is the duty of the collecting officer to inform the wife if payments fall into arrear to the extent of four weeks. She may take proceedings herself for recovery of the arrears or she may ask the collecting officer to do so; if asked, he must take proceedings unless that course seems to him unreasonable in the circumstances.

1088. Maintenance orders are enforceable in the same manner as affiliation orders. The means available may be divided into two classes: firstly, methods by which the money due is taken from the defaulter against his will; and secondly, the power to commit the defaulter to prison.

1089. The first class comprises: (i) taking money found on the man on his arrest, (ii) distress, and (iii) attachment of his income. These methods are in practice of little or no use for the enforcement of maintenance orders in magistrates' courts. Distress is only effective if the husband has any money or property which may be distrained. The power to attach a man's income is in effect a dead letter, since there are so many statutory restrictions on its use. (It is, moreover, doubted by some whether this method of enforcement is in fact applicable to maintenance orders.)

1090. The only effective weapon against a defaulter under a maintenance order is therefore the power to commit to prison. A man must not be sent to prison if he genuinely cannot pay. Section 74 (6) of the Magistrates' Courts Act, 1952, provides that on an application for enforcement the court must enquire whether the husband's default was due to his wilful refusal or culpable neglect, and it must not commit him to prison if it considers that the failure to pay was not due to such wilful refusal or culpable neglect. The burden of proof is, however, on the defaulter to show that he could not have paid and not (as in proceedings by way of judgment summons in the High Court and the county court) on the wife to show that he has had the means to pay.

1091. Where the court decides to commit the defaulter to prison, it is a common practice to suspend the issue of the warrant on the condition that he pays off the arrears by instalments. Although power to suspend the issue of a warrant of commitment in cases of civil debt was expressly excluded under the Summary Jurisdiction Act, 1879, the practice has in fact been followed for some considerable time and is now allowed under Section 65 (2) of the Magistrates' Courts Act, 1952.

1092. Imprisonment for default cancels the debt in respect of which it has been imposed. (This is not so in the case of committal to prison for arrears under a maintenance order made by the Divorce Division nor is it the position in Scotland.) No arrears of maintenance accrue while the husband is in prison unless the court makes a specific order to this effect.

1093. Finally, the court has power to remit arrears of maintenance in whole or in part (Section 76, Magistrates' Courts Act, 1952).

Enforcement of orders in other countries

1094. Orders made in England may be enforced in territories within the Commonwealth to which the Maintenance Orders (Facilities for Enforcement) Act, 1920, has been applied; they may be enforced in Scotland and Northern Ireland under the Maintenance Orders Act, 1950. The procedure in both cases is that the order is registered in the appropriate court in the country where the defendant resides and enforced as if it had been made by that court. Similarly, orders made in the territories to which the Act of 1920 has been applied, and in Scotland and Northern Ireland, can be registered and enforced in England. In addition, under the Act of 1920, a magistrates' court in England has power to make a provisional order against a husband who is resident in some other country to which the Act has been applied. The order has no effect until it has been confirmed by order of a competent court in that country. A magistrates' court in England similarly has power to confirm a provisional order made by a competent court in another country.

PROPOSALS AND RECOMMENDATIONS

Attachment of wages

1095. One of the most difficult problems is how to deal with the man who persistently fails to pay his wife the maintenance which a court has ordered him to pay. We received a great deal of evidence as to the hardship suffered by such wives and as to the cost to the community in providing national assistance for them. Witnesses were agreed that the procedure for enforcing a maintenance order in a magistrates' court was admirably designed in that it was simple and quick and cost the wife practically nothing. The drawback was that often enforcement proceedings did not secure to her the money which she needed; this was shown by the substantial number of men who were sent to prison each year for default in payments under a maintenance order. The solution favoured by many witnesses was the introduction of a system providing for attachment of the man's wages to meet maintenance payments³².

1096. Section 2 of the Affiliation Orders Act, 1914, provides that if a man against whom an affiliation order has been made defaults in payments without reasonable cause, and there is any pension or income payable to him and capable of being attached, then the court may order that the amount payable each week under the order be attached and paid to the person named by the court.

1097. A wife's maintenance order is enforceable in the same manner as an affiliation order (by virtue of Section 9 of the Summary Jurisdiction (Married Women) Act, 1895), so that it would seem that this method of attachment is also applicable to maintenance orders (though some doubt has been expressed on this). However, the inclusion of the words "capable of being attached" makes Section 2 of the Affiliation Orders Act, 1914, virtually ineffective (and in fact little or no use is made of it to enforce an affiliation

³² The evidence we received was in the main directed to the problem of the man who defaults under a maintenance order made by a magistrates' court. Some witnesses, however, made it clear that they considered that attachment of wages should also be applicable to payments due under a maintenance order made by the High Court.

order), since, by virtue of the Wages Attachment Abolition Act, 1870, the wages of any servant, labourer or workman cannot be attached. The salary or pay of Crown servants is also exempt from attachment, and there are certain other limitations on the power of attachment³³.

1098. The proposal for attachment of wages favoured by most witnesses was on the lines of the remedy which Section 2 of the Affiliation Orders Act, 1914, would provide if the present limitations were removed. That is to say, they suggested that if a husband has wilfully and persistently defaulted in payments under a maintenance order the court should have power in its discretion to order that the amount of maintenance payable each week should thenceforth be deducted from his wages by his employer and sent to the court collecting officer. One or two witnesses proposed that the court should be able to order deduction from wages at the time of making the maintenance order, i.e., that the application of the power should not be conditional on the man's default. Others considered that the deduction from wages should be made only in respect of arrears owing to the wife. It was also suggested to us that it might be possible to arrange that the husband's code number under the P.A.Y.E. system should be adjusted so as to increase his weekly deductions in respect of income tax by the amount necessary to provide for the maintenance payments; the advantage of some method on these lines would be that the employer would not know that the court had made a maintenance order against the man.

1099. The idea that the court should be able to order that maintenance payments be deducted from a man's wages by his employer is not new. The Gorell Commission thought that the court should be able to make such an order, but that the order should merely authorise the employer to pay the amount ordered to be paid out of the husband's wages, that is to say, the employer should be at liberty to assent or decline to act on the order³⁴. The Departmental Committee on the Imprisonment by Courts of Summary Jurisdiction in default of Payment of Fines and other Sums of Money (the Fischer Williams Committee), which reported in 1934, went into the question of attachment of a man's pension or income in some detail, since the proposal was strongly pressed upon the Committee. It recommended that if a man wilfully defaulted the court should have power to order that the amount payable (in respect of future payments as well as arrears) should be deducted from his income at its source; but it considered that the power should be exercised with discretion³⁵. The Committee's recommendation was not accepted. Later attempts to introduce proposals on similar lines have been unsuccessful. One such proposal was considered during the passage through Parliament of the Married Women (Maintenance) Bill, 1949³⁶; the Women's Disabilities Bill, introduced in 1952 and again in 1953, contained provision for deduction of maintenance payments from wages.

1100. The arguments against giving the court power to order attachment of wages, which were put to the Fischer Williams Committee by witnesses representing both employers and workpeople, were:

- (i) An employer would be more likely to dismiss a man than be put to the trouble of making deductions from his wages and paying the amount deducted to the court collecting officer; or the employer might object on principle to continuing to employ a man against whom such an order had been made.

³³ The pay of members of the Armed Forces and of merchant seamen is exempt from attachment by a court but it may be noted that there is statutory provision for deductions to be made from the pay of a member of the Armed Forces, or a merchant seaman, against whom an order for maintenance has been made.

³⁴ Cd. 6478, paragraph 174.

³⁵ Cmd. 4649, Chapter VII.

³⁶ Official Report, Commons Standing Committee "E", 12th May, 1949, Columns 1224 to 1232.

- (ii) Any system of attachment of wages would tend to upset generally the relations between employers and employees.
- (iii) Since any such system could be applied to the regular wage earner only, it would discriminate unfairly against him as compared with the casual labourer or the man working on his own account.
- (iv) Attachment of wages would be of no help where the man was out of work and it was usually because he was out of work that he failed to pay.
- (v) There was a general pre-disposition to regard with suspicion or even hostility anything which seemed to savour of an attack on the income of the wage earner.

1101. In favour of the proposal, and to meet the criticisms advanced, the following arguments were put to the Fischer Williams Committee:

- (i) There could be no objection in principle to a measure which did nothing more than ensure that a man discharged out of his earnings a liability which ranked very high in the scale of his social obligations and which would have been fixed, if the law had been observed, with special reference to those earnings.
- (ii) The proposal was not without precedent. If a maintenance order were made against a member of the Armed Forces, deductions could be made from his pay to meet the payments under the order. In Scotland it had been possible for a very long time to arrest a man's wages; it was said that the power to do this had a most salutary effect in securing compliance with an order for aliment and thereby avoiding the necessity for imprisonment; sentences of imprisonment in Scotland for failure to pay aliment were very much rarer than in England, in proportion to the respective populations.
- (iii) Employers would not be substantially affected if deduction were authorised only after default had occurred, as the number of cases involved would not be large. Such a limited measure would seem unlikely to prejudice relations between employers and employees. It would occasion little work for the employer and thus could not reasonably be made a ground for dismissal. Some firms already made deductions for such a purpose at the request of their employees.
- (iv) The alternative to a system of deduction was imprisonment, and imprisonment was more likely to cause the defendant's loss of employment than the mere deduction of part of his wages.
- (v) The fact that some persons would be outside the scope of the scheme was not a cogent argument against it. While the system would have no application where a man was out of work, it would apply to many cases where a man was in work, and where it would be beneficial as a safeguard against a stubborn refusal to pay, or as a corrective of the carelessness or fecklessness or weakness of character which often led men to neglect an obligation without any deliberate intention of avoiding it.

1102. Very much the same arguments and counter-arguments were advanced to us. Against the proposal it was also argued that it would play into the hands of a spiteful wife; that it would be wrong to make known to an employer the matrimonial difficulties of his employee; that a third party should not be made in effect a collecting officer in a matter which rests between husband and wife; that to take money from the husband in this way would represent an interference with his independence; and that the handling of the money might be a considerable temptation to the small-scale employer.

1103. Witnesses who advocated provision for attachment of wages referred to the favourable results of such provision in other countries, in particular Scotland. The power of arrestment of wages in Scotland is, however, part of the common law, so that it may be said to be traditional to the country and therefore accepted as a matter of course. Under the English common law there was no procedure for the attachment of debts; this was first introduced in 1854. In 1870 the power of attachment was very substantially limited by the Wages Attachment Abolition Act, to which we have referred in paragraph 1097. Thus it may be said that the history of the existing power of attachment in England is not such as to suggest that any extension would be readily acceptable to the people.

1104. It was also remarked that in view of the growth in recent years of many national authorities as large-scale employers, some of the objections raised against the Fischer Williams Committee's recommendation might now have lost much of their force, since they had been made at a time when, in the main, men were employed by private employers.

1105. We obtained the views of representatives of the wage earners and of the employers, including the nationalised industries. These are set out in the Appendix to the Minutes of Evidence. From this evidence it would seem that there has been little, if any, change in the views expressed to the Fischer Williams Committee by representatives of the employers and of the wage earners, as set out in paragraph 1100. It is clear that to seek to introduce any system of attachment of wages would be likely to meet with strong opposition from employers and workers alike, on the ground that it would bring the employer into the private affairs of his workers and thus might seriously prejudice relations between employers and employees.

1106. We have carefully examined the possibility of devising some method whereby provision could be made for deduction of the maintenance payments from a man's wages without the reason for this deduction being disclosed to the employer. If this were feasible, it would remove or diminish some of the objections to deduction of maintenance payments. Our examination has, however, satisfied us that there is no method which would ensure that the reason for the deduction remained confidential to the husband.

1107. The arguments set out in paragraphs 1100 and 1102, taken together with the considerations to which we have referred in paragraphs 1103, 1105 and 1106, have persuaded us that it would be inadvisable to introduce any system of attachment of wages in England and Wales. Not all the objections to the introduction of attachment of wages are of equal weight but their cumulative force is impressive. Moreover, given the objections which have been raised, in our opinion a power to attach wages would not in practice deal effectively with the man who deliberately evades his obligations to his wife and family, the man who will go to prison rather than pay the maintenance ordered by the court. It is this man who constitutes the real problem; the existing law is usually able to deal with the other types of defaulter, such as the man who is merely careless or improvident. But the man who at present will go to prison rather than pay is just the man who would be likely simply to give up his job if his wages were attached.

Cancellation of the debt by imprisonment

1108. It was put to us that it was wrong that the arrears of maintenance due to the wife should be cancelled if the husband was sent to prison; he was punished but her needs were left unsatisfied. Against this it was argued that it would be unfair to the defaulter if, having served his term, he was still faced with an outstanding debt and that in practice wives would not get more money if the law were changed. We think, however, that the balance of

advantage would lie in altering the law. To accept as a principle that a man does not divest himself of his obligations by going to prison seems to us eminently fair, and likely to have a salutary effect on defaulting husbands. The possibility that in individual cases injustice might be done is guarded against by the power which the court already has to remit arrears of maintenance in whole or in part, a power which we consider should be retained. We accordingly recommend, with two dissentients³⁷, that committal to prison should not cancel the arrears of maintenance in respect of which the imprisonment was imposed. It should not, however, be possible to commit a man to prison for a second time in respect of the same arrears and, in committing a man to prison in respect of new arrears, no account should be taken of any arrears outstanding in respect of which he has already served a term of imprisonment.

1109. We do not suggest that there should be any change in the present rule whereby no arrears of maintenance accrue in respect of current payments while the husband is in prison for default unless the court otherwise orders.

Suspended committal orders

1110. As we have explained, it is a common practice to suspend the issue of a warrant committing a defaulter to prison on the condition that he pays off the arrears of maintenance by instalments. In our opinion this is a useful practice; the defaulter is given a second chance and at the same time the wife has a better prospect of getting the money owing to her. There are, however, certain defects in the present procedure to which our attention was drawn. In the first place, if the husband fails to keep up payments under a suspended committal order there is no provision for enquiry into the reason for his default. We were told that serious injustice may be done if the committal order is automatically enforced on a breach and that in some districts it may fall to a clerk in the office to decide whether an order for committal to prison should issue or not. It was also pointed out to us that the husband is given no opportunity to apply to the court to ask for an adjustment of the terms of the suspended committal order if he is ill or out of work. We accept these criticisms. We accordingly recommend that where a husband defaults in payments under a suspended committal order, he should be given notice in writing by the court that, unless he applies to the court within, say, four days, he will be committed to prison. The notice should be sent to the address which the husband has previously been required to supply to the court.

Recovery of arrears of maintenance from the estate of a deceased spouse

1111. We have already remarked upon the fact that where a person who has been ordered by the High Court to pay maintenance dies, arrears of maintenance cannot be recovered from his estate, and we have recommended that provision should be made to allow them to be recovered if the court thinks fit (see paragraph 594). The position is the same regarding arrears due under a maintenance order made by a magistrates' court³⁸. In our view, there should be no distinction between arrears due under an order of the High Court and those due under an order of a magistrates' court. Accordingly we recommend that where payments of maintenance under an order of a magistrates' court are in arrear at the date of death of the person who has been ordered to make them, a magistrates' court should have power, on the application of the person to whom the payments were due, to order that the sum owing be treated as a legal debt against the deceased's estate, if it considers it reasonable in all the circumstances to do so.

³⁷ Lady Bragg, Mr. Maddocks.

³⁸ *Re Bidie*, [1948] Ch. 697.

The Maintenance Orders (Facilities for Enforcement) Act, 1920

1112. Where a provisional order has been confirmed by a magistrates' court in England under Section 4 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, the confirming court has power to entertain an application for the variation or discharge of the order as if it had been made by that court in the first place. Where, however, an order which is not expressed to be provisional has been registered in a magistrates' court in England under Section 1 of the Act of 1920, the power of the court extends only to entertaining proceedings for the enforcement of the order and not to proceedings for its variation or discharge³⁹.

1113. Where the order has been registered under Section 1 a husband may suffer real hardship; the wife is able to enforce the order against him without coming to England but if he wishes to apply for variation or discharge he must take proceedings in the country in which the order was made. We accordingly recommend that the magistrates' court in England in which a maintenance order has been registered under the provisions of Section 1 of the Act of 1920 should be given the same power to vary or discharge the order as it already has in respect of an order confirmed by it under Section 4 of the Act of 1920. It will be necessary to provide for service of the summons for variation or discharge to be effected by sending it by registered post to the last known address of the wife.

PROCEDURAL MATTERS

Applications where the courts for two or more districts are involved

1114. Quite often on an application for variation or enforcement of an order the courts in two or more districts may be involved. Thus, a wife may have obtained a maintenance order from court "A" and have subsequently moved to the district of court "B" while her husband has moved to the district of court "C". The procedure for dealing with applications for variation or for enforcement in such circumstances is laid down in the Magistrates' Courts Rules, 1952 (Rules 34 and 49).

Applications for variation, revival or discharge

1115. An application for the variation, revival or discharge of a maintenance order may be made either to the court which made the original order (the "original court") or to the court for the district in which the applicant resides. If the application is made to the latter court, the complaint and the particulars which have to be furnished by the applicant must be sent to the original court, for that court to consider the most convenient place for hearing the complaint. Three courses are open to it: it can hear the complaint itself or it can send it to the court for the district where the applicant is living or to the court for the district where the defendant is living.

1116. This procedure was criticised on the ground that the original court is not in the best position to decide where the complaint should be heard if neither party is living within its district. On the other hand, the court to which the payments under the maintenance order are being made has the advantage of being in touch with both parties, through its collecting officer, and thus is better able to make this decision. It was also said that the choice of place for the hearing is very limited, and that consequently, if the

³⁹ *Pilcher v. Pilcher*, [1955] 2 All E.R. 644.

husband and wife live at a considerable distance apart, one or the other will be put to considerable expense in attending the hearing. It was suggested, therefore, that the court should have power to direct that the hearing should take place before a court for a district in which neither party lives, for instance the court for a district midway between the parties, so that the expense incurred in attendance would be shared. A further suggestion was that a party or a witness should be allowed to give evidence on oath before a magistrate in his own district; the sworn statement would then be sent to the court which is to hear the application and would be admissible as evidence.

1117. We think that the court to which payments under an order are being made is likely to know more about the circumstances of the parties than any other court and that it would, therefore, be more appropriate for that court to determine where an application for variation, revival or discharge should be heard⁴⁰. We recommend accordingly.

1118. We recommend also that the court which is to hear an application for variation, revival or discharge should have power to authorise the taking of, and to accept in evidence, a sworn statement or a statutory declaration as to the means of a party if it appears that unnecessary hardship or expense would be caused by requiring the personal attendance of a party or a witness. The further proposal for an extended choice of courts, so that it should be possible for the hearing to take place at a court, say, midway between the districts in which the parties lived, would then be unnecessary.

Applications for enforcement

1119. Where an application for the enforcement of a maintenance order is made to the court to which the payments are ordered to be made (the "collecting court"), that court is allowed to send the application to the court for the district in which the husband is living, if it considers that the latter court could more conveniently enforce the order. The collecting court is required to inform the enforcing court forthwith if it receives any payments from the husband after the application for enforcement has been despatched. We were told that in practice this arrangement does not work very well. The enforcing court is consequently often faced with the difficulty that it does not have up-to-date information of the state of the husband's account and he is sometimes in danger of being committed to prison for default although he has in fact remitted the appropriate sums to the collecting court. It was suggested, therefore, that the court in which proceedings for enforcement are being taken should at the same time become the court responsible for collecting the payments.

1120. We think that this is a valid criticism of the present system and that it is not adequately met by impressing on collecting officers the need to inform the enforcing court immediately of any payments received. We consider that when the court for the district in which the husband is living takes over enforcement proceedings from the court to which payments under the order are being made, the order should be varied so as to make the court which is enforcing the order the court to which payments must henceforth be made, i.e., the enforcing court should become the collecting court; and we recommend accordingly. We appreciate that to achieve this it would be necessary to make statutory provision for a mandatory variation of the order in such circumstances, since, as the law stands, an application thus to

⁴⁰ We appreciate that sometimes payments are ordered to be made direct to the wife. In that case we think that the present procedure should apply.

vary the order would have to be made by the wife or the husband. In principle the idea of compulsory variation may be open to objection but in this particular case we think that the practical advantages outweigh any objection in principle.

Notice of adultery to third parties

1121. In the Divorce Division a pleading containing an allegation of adultery must be served not only on the respondent spouse but also on the third person named in the pleading and that person may appear in the suit and file an answer to the allegation. In proceedings in a magistrates' court notice of adultery is not served on the third person nor does he or she have a right to become a party to the proceedings. The court does not, however, make any finding of adultery specifically against that third person nor can he or she be made liable for damages or costs (as may be done in divorce proceedings).

1122. It was argued by some witnesses that it is wrong that in a magistrates' court no notice is given of a charge of adultery, since it is only just that a person against whom such a serious allegation is made should have the opportunity to dispute it. Moreover, there is the risk that there may be collusion between husband and wife, and it is in fact in a collusive case that it is most likely that injustice to the third person would result. Accordingly, these witnesses suggested that the person who is alleged to have committed adultery with the defendant spouse should be given written notice of the charges and should have the right to defend himself or herself against them. The Gorell Report also contained a recommendation on the same lines⁴¹. Against this proposal, it was said that it would introduce an unnecessary complication into proceedings in a court of summary jurisdiction; such proceedings should be simple and inexpensive and to require service to be carried out in every case would make the proceedings complicated and costly; substituted service would often be necessary and any form of this would mean delay and extra expense. It was further said that in practice there is no injustice under the present procedure; indeed quite often the identity of the third person is not known.

1123. We agree that on the ground of delay and expense it would be undesirable to introduce into magistrates' courts the procedure operated in the Divorce Division. Nevertheless, we think that it is right in principle that a person who is alleged to have committed adultery should be allowed to defend himself. Accordingly, we recommend that notice of an allegation of adultery should be sent by the court by registered post to the last known address, if any, of the third person; that person should then have the right to appear and defend himself or herself against the charge. We consider that if this simple procedure were adopted, it would, so far as is reasonably practicable, rule out the possibility of injustice being done.

Particulars of cruelty

1124. Under the present practice an applicant who alleges persistent cruelty is not required to give particulars of the cruelty before the case is heard. On the other hand, if adultery is alleged, the Divisional Court has made it plain that full particulars of the adultery should always be set out; this is done in a written statement, which in some courts is attached to the summons. It was said that particulars should also be given of persistent cruelty; a husband is at a serious disadvantage when he is called upon to answer, at a moment's notice, charges of cruel acts which may be spaced over

⁴¹ Cd. 6478, paragraph 196.

many years, and he may not have available the witnesses he needs in his defence. In our opinion, while it would be desirable if particulars of a charge of persistent cruelty could be provided, it would not be practicable to require this to be done. It would be far more difficult than giving particulars of adultery and we think it too much to expect of a woman who is not legally represented. On the other hand, it would not be right for the magistrates' clerk or the probation officer to help her to set out her allegations. We recognise that the husband may be taken by surprise under the present practice but when this happens we understand that the court will always grant an adjournment.

Power to order a re-hearing

1125. We recommend that a magistrates' court should have power to order a re-hearing of a case if it is shown that the complaint was originally dealt with in the defendant's absence, by reason of a misunderstanding about the date or time of the hearing or of the fact that the summons did not reach him or her before the hearing.

APPEALS

THE PRESENT POSITION

1126. There is only one method of appeal from a decision of a magistrates' court in a matrimonial case, namely, an appeal to a Divisional Court of the Divorce Division consisting of two judges. The procedure is governed by the Matrimonial Causes Rules, 1950 (Rule 71). The court usually proceeds on the magistrates' clerk's note of the evidence and the magistrates' reasons for their decision, together with the arguments of counsel for the parties.

1127. If the magistrates' clerk's note of the evidence is not produced, or is incomplete, the Divisional Court may accept other evidence of what occurred before the magistrates. Fresh evidence, however, will only rarely be accepted by the Divisional Court.

1128. The court may allow the appeal and discharge or vary the order or it may dismiss the appeal or it may discharge the order and send the case back to the magistrates for a re-hearing. The Divisional Court has, however, made it plain that it will not as a rule reverse a finding of fact unless there was no evidence to warrant the magistrates' decision.

1129. For appeals in other types of case dealt with by magistrates' courts two methods are provided. Firstly, there is an appeal to quarter sessions. Under this method the case is re-heard (that is, there is in effect a fresh trial) and it is used where the appeal is solely or primarily on questions of fact. Secondly, if there is no dispute over the facts but the sole point at issue is a point of law, there is an appeal by case stated to the Queen's Bench Division of the High Court. (If there is an outstanding point of law at issue after an appeal has been heard by quarter sessions, this may also be taken by case stated to the Queen's Bench Division.)

PROPOSALS AND RECOMMENDATIONS

Extension of facilities for appeal

1130. During the passage of the Married Women (Maintenance) Bill, 1949, the question of facilities for appeal in matrimonial cases in magistrates' courts was considered. A clause putting matrimonial appeals on the same footing as other appeals was passed by the House of Commons but deleted

by the House of Lords, on the ground that a Private Member's Bill should not be used to introduce a change which might be controversial; the amendment was accepted by the House of Commons⁴².

1131. At the Committee stage in the House of Commons it was said, in support of this proposal, that it was very desirable that it should be possible to re-open questions of fact in matrimonial appeals. This was difficult under the present procedure, where the parties and the witnesses were not heard. The Divisional Court of the Divorce Division quite reasonably took the view that it would not reverse a finding of fact by a magistrates' court unless it appeared that that finding was clearly wrong; the magistrates had heard the parties and their witnesses and had formed a conclusion as to their credibility and the reliability of their evidence. Under the present procedure there was therefore a very heavy burden on the appellant if he wished to overturn the verdict on the facts. The result was that parties (especially husbands) felt a sense of grievance; if they genuinely believed that the magistrates had wrongly rejected their evidence, they had no means of redress⁴³.

1132. Against this proposal it was said, during the Second Reading in the House of Lords, that it was unsound to argue that the procedure for appeals in matrimonial cases should be the same as that for appeals in criminal cases. Matrimonial cases were in a quite separate category. In dealing with them magistrates were administering a matrimonial code which was in the main identical with the divorce law as administered by the Divorce Division. Moreover, the order made by magistrates in these cases might later form the basis of divorce proceedings. It was therefore right that all matrimonial appeals should go to the Divorce Division, which was best fitted to exercise the general supervisory function that an appellate jurisdiction implies. Quarter sessions, on the other hand, had no experience of matrimonial cases and there was no method of co-ordinating the decisions of one court of quarter sessions with those of another. Under the present procedure the whole of the evidence was examined by the Divisional Court, which had before it the magistrates' clerk's notes of the evidence and the reasons for the magistrates' decision. There was therefore a re-hearing by the Divisional Court, though it was true that it was a re-hearing without witnesses. In fact, the Divisional Court and the magistrates were in the same relationship to each other as the Court of Appeal was to the judges of the Divorce Division, so that there was uniformity of appellate control over the whole matrimonial field. It was further said that the procedure by way of case stated, under which the appellate court is bound by the statement of the facts, would be quite inappropriate in most matrimonial appeals, which often involved consideration of a course of conduct extending over many years: as a result very few appeals would go to the Divisional Court⁴⁴.

1133. Some of our witnesses urged strongly that the facilities for appeals in matrimonial cases should be on the same lines as those available for other cases, in order that it should be possible to obtain a complete re-hearing of a matrimonial case. It was pointed out that the magistrates' decision in such cases may have important consequences affecting the whole future life of the parties. Under the present procedure the decision on the facts is left very much in the hands of the magistrates who heard the case as a

⁴² Official Report, Commons, Vol. 466, Column 708; Lords, Vol. 164, Columns 352-355; Commons, Vol. 470, Columns 1587-1597.

⁴³ Official Report, Commons Standing Committee "E", 5th May, 1949, Columns 1197-1204.

⁴⁴ Official Report, Lords, Vol. 163, Columns 1026-1032.

court of first instance ; but, it was said, it is not always safe to assume the reliability of findings of fact by the magistrates, especially if the defendant was not legally represented. It was also said that the material before the Divisional Court is in any event inadequate for a review of the facts of the case. However able and experienced a magistrates' clerk may be, he cannot hope to get down everything which may have influenced the magistrates in coming to their decision or which may be relevant to a re-consideration of that decision. It was further argued that it is wrong to compare an appeal from a judge of the High Court to the Court of Appeal with an appeal from a magistrates' court to the Divisional Court. The case before the judge had been carefully presented by counsel and the Court of Appeal had before it a complete record of the proceedings.

1134. In view of the representations made to us by those who were themselves concerned with matrimonial cases in the magistrates' courts, we have given very careful consideration to the suggestion that there should be a right of appeal in such cases by way of re-hearing to the quarter sessions, coupled with a right of appeal on points of law by case stated to the Divorce Division. We have, however, with three dissentients⁴⁵, decided to reject the proposal. In our opinion the conduct of cases by magistrates is on the whole good, and we think that in general a magistrates' court is just as competent to get at the truth on the evidence as a court of quarter sessions would be. Moreover, the Divisional Court is free to differ from the findings of fact and can do so if it thinks that the evidence is insufficient to support the findings. In practice, where the Divisional Court considers that the first trial has been unsatisfactory, it usually orders a re-hearing of the case by the magistrates. We would not feel justified in recommending that there should be an appeal on the facts to quarter sessions (or some other local tribunal) in order to make provision for those very few cases where perhaps a complete re-hearing might be of benefit. On the other hand, if such an appeal were allowed, we think that advantage would be taken of it in very many cases where there was no real justification ; it is only human nature to want to have a second trial of one's case before a new bench if one can. Quarter sessions are already overburdened and it would be unreasonable to expect them to cope with the additional volume of work which would result.

1135. There is, however, a second and in our view conclusive reason for rejecting the proposal. We consider it essential that the Divorce Division should exercise a controlling and supervisory role in respect of the matrimonial jurisdiction of magistrates' courts. Its function in keeping the law uniform in matrimonial matters is especially important because there are so many magistrates' courts throughout the country, the decisions of which may have an important effect on the status of the parties. It would be very difficult for the Divorce Division to discharge this function effectively if its appellate jurisdiction were confined to cases where the facts are not in dispute and the sole issue is a point of law. There is not a large number of such cases. In the majority of matrimonial appeals questions of law and fact are inextricably mixed ; and all such appeals would of course go to quarter sessions. Thus, the Divisional Court would be deprived of a very large part of the work which it at present does, and in such circumstances it is difficult to see how the Divorce Division could continue to exercise an effective control over the matrimonial jurisdiction of magistrates' courts.

1136. We have also considered the criticism that the material before the Divisional Court does not provide a satisfactory basis on which to review the facts of the case. We think that the magistrates' clerks on the whole discharge their duties with commendable skill and care but we recognise

⁴⁵ Mr. Lawrence, Mr. Mace, Mr. Maddocks.

that it may sometimes be difficult for the clerk to provide in his note all the material which may be useful to the Divisional Court. We think that it would be desirable that there should be available to the Divisional Court a complete record of what has been said in the magistrates' court, taken either by a shorthand writer or by some form of recording machine. We recognise, however, that our proposal would add considerably to the expense of magistrates' courts, and that it might be difficult to make suitable arrangements in courts in country districts. If, however, it is not found to be impracticable on grounds of expense, or for other good reason, we consider that our proposal should be accepted.

Other matters relating to appeals

Duties of magistrates' clerks

1137. It was said that the duties of the magistrates' clerk in respect of an appeal are difficult to ascertain; it is necessary to refer to the decisions in a number of reported cases, which may not be available to the clerk in small country courts. It was suggested that the clerk's duties should be set out in a Rule. This seems to us a reasonable proposal and we recommend accordingly.

Notification of the result of an appeal

1138. It was suggested that the result of an appeal from a decision of a magistrates' court should be notified to that court. We agree that this would be desirable and we have ascertained that it could be arranged without difficulty. We therefore recommend that steps be taken to put this proposal into effect. It was also suggested that the Divisional Court should be given power to direct that a transcript of its judgment should be sent to the magistrates' court from which the appeal had come, in any case in which the Divisional Court thought that this would be desirable. We are in favour of this proposal but we understand that it has already been put into effect⁴⁶.

Power of the Divisional Court to make an interim order

1139. If, on an appeal to the Divisional Court, the court decides to send the case back to the magistrates' court for a re-hearing we think that it should have power to make an interim order for maintenance; and we recommend accordingly.

CONCURRENT JURISDICTION WITH THE DIVORCE DIVISION OF THE HIGH COURT

THE PRESENT POSITION

1140. The jurisdiction of magistrates' courts is in many respects concurrent with that of the Divorce Division of the High Court. The only statutory links between the two sets of courts are:

- (a) Section 10 of the Summary Jurisdiction (Married Women) Act, 1895, which empowers a magistrates' court to refuse to make an order if the matter could "be more conveniently dealt with by the High Court".
- (b) Section 7 (2) of the Matrimonial Causes Act, 1950, which empowers the Divorce Division to accept a magistrates' court order as sufficient proof of the adultery or other ground on which it was granted.

Little use has been made of the first statutory provision.

⁴⁶ See *Harvey v. Harvey*, [1955] 3 All E.R. 82.

1141. The relationship between the High Court and magistrates' courts is, however, governed by a number of decided cases⁴⁷. It appears that the same issue should never be dealt with by both courts and that, where there is likely to be a conflict of jurisdiction, the High Court should prevail. It is accordingly the practice of magistrates' courts to adjourn the hearing of an application *sine die* when it is learned that one of the parties has a petition pending in the Divorce Division. Thus, as we have explained in paragraph 1060, a wife is unable to obtain a maintenance order in a magistrates' court if divorce proceedings are pending. If, however, she already possesses a maintenance order (or an order for the custody of the children), the dissolution of the marriage does not of itself discharge the order nor does it of itself oblige a magistrates' court to discharge it. (In practice, it is quite usual for a wife who divorces her husband to continue to rely on a maintenance order she has previously obtained in a magistrates' court, instead of obtaining a maintenance order in the Divorce Division; she may similarly rely on an existing custody order.) Further, if the question of the custody of the children has not been dealt with by the Divorce Division, after the dissolution of the marriage a magistrates' court may exercise its jurisdiction to make a custody order under the Guardianship of Infants Acts. It would also seem that a magistrates' court may make a custody order under these Acts even though divorce proceedings are pending, if the question of custody is not being raised in the proceedings.

PROPOSALS AND RECOMMENDATIONS

1142. The Magistrates' Association and the Justices' Clerks' Society said that there was considerable difficulty in practice in applying the law in the varied circumstances arising in magistrates' courts, and that magistrates were often left in doubt whether or not they should hear an application if divorce proceedings had been started. In particular, it was uncertain if they should then deal with an application for custody under the Guardianship of Infants Acts. The witnesses considered that the position should be clarified, but they put before us different proposals as to the lines which should be followed. The Magistrates' Association was divided in its views. Some members thought that once a petition for divorce had been presented, the jurisdiction of the Divorce Division should be exclusive on all matters, and further, that the granting of a decree should automatically discharge any magistrates' order for the wife's maintenance or for the custody of the children: other members wished to see the present jurisdiction of magistrates' courts extended to include the making of interim orders for maintenance up to the hearing of the divorce case and of "permanent" orders after a decree had been obtained, as well as the enforcement of maintenance orders made by the Divorce Division. The Justices' Clerks' Society also proposed an extension of the present jurisdiction of magistrates' courts, on rather wider lines, which involved the development of a closer relationship between magistrates' courts and the Divorce Division.

1143. It seems to us that the principles determining the assumption of jurisdiction by magistrates' courts, where a conflict may arise with the jurisdiction of the Divorce Division, are now sufficiently clearly established. There will, however, be border-line cases; we can see that it may sometimes be difficult for a magistrates' court to decide whether it would be proper for it, in the circumstances of the particular case, to assume jurisdiction, or whether it should give way to the superior court. We sympathise with the desire of those who have to deal with such cases that they should be given

⁴⁷ The memorandum submitted to us by the Justices' Clerks' Society sets out these cases in detail—see Appendix I in Paper No. 33, Minutes of Evidence, Twelfth Day.

clear guidance, but we think that it would be quite impossible to provide, in a statute or otherwise, precise rules to regulate the exercise by magistrates' courts of a concurrent jurisdiction with the Divorce Division.

1144. We have considered whether the present jurisdiction of magistrates' courts should be modified, whether by extension or restriction, on the lines suggested by the witnesses. We do not favour any limitation of the present jurisdiction. We think that it should be open to a wife who obtains a divorce to keep her existing orders for maintenance and for custody and maintenance of the children, if she wishes; we see no reason why she should be compelled to apply to the Divorce Division for fresh orders.

1145. We have already made two recommendations for the extension of the jurisdiction of magistrates' courts, namely:

- (i) that they should have power to make an interim order for maintenance to last up to the end of matrimonial proceedings in the Divorce Division (see paragraph 1061); and
- (ii) that it should be possible for an order for maintenance made by the Divorce Division to be registered in a magistrates' court and thereafter to be dealt with as to collection, variation and enforcement as if it had been made originally by a magistrates' court (see paragraph 582).

We consider that any further extension of the jurisdiction of magistrates' courts would be inadvisable. We endorse the principle that magistrates' courts should not attempt to deal with issues which are shortly to come before the Divorce Division. It would accordingly be undesirable for magistrates' courts to deal with an application for a maintenance order (as distinct from an order for interim maintenance) if matrimonial proceedings have been started in the Divorce Division. It would also be undesirable for a magistrates' court to deal with an application for custody (under the Guardianship of Infants Acts) if an application for custody has been made in such proceedings. We see no reason, however, why a magistrates' court should not deal with such an application if neither party is asking for custody in the proceedings in the Divorce Division. Since there seems some doubt whether this can be done at present, we recommend that a magistrates' court should have this power.

MISCELLANEOUS MATTERS

Tracing a missing husband

1146. It may be very difficult to trace a husband who has disappeared with the object of evading his responsibilities to his wife and children. A wife cannot, however, proceed with her application for an order until her husband is found, since the law requires that a summons be served on him before the case can be heard. Witnesses who gave evidence on this problem thought that not enough was done to help the wife in this position. In addition to suggestions that the court should take a more active part in trying to trace the husband and that the police should give more assistance, two specific proposals were put to us. Firstly, it was suggested that Government Departments should be required to make available any information in their possession of the husband's whereabouts; this should be given to an officer of the court, to guard against the possibility of its falling into the hands of a vindictive wife. Secondly, it was proposed that, where a summons could not be served, it should be possible to issue a warrant of

arrest to bring the husband before the court⁴⁸, since the police might sometimes be able to find him where other means of tracing him were unsuccessful.

1147. When proceedings have to be taken to enforce a maintenance order there may again be the problem of finding the husband. Witnesses advocating the first of the above proposals contemplated that it would also be useful if a defaulting husband had disappeared. The second proposal is not applicable to enforcement proceedings, since in such proceedings a warrant of arrest can be issued instead of a summons. A further proposal was, however, put to us, namely, that a magistrates' court should have power in its discretion to remand the husband in custody for a limited period where enforcement proceedings had to be adjourned for some reason (for instance, to obtain more information as to the husband's ability to pay the maintenance ordered). We were told that the court needs this power to enable it to deal effectively with the persistent defaulter who is difficult to trace. In such cases, it may have taken months for the police to trace and arrest the man and his release on the adjournment of the proceedings usually means that they will have to start looking for him all over again.

1148. We have given very careful consideration to these proposals because we recognise that they are designed to deal with an intractable problem. We have, however, regretfully rejected them. We are satisfied that it would be wrong to require Government Departments to disclose the husband's address, whether to an officer of the court or to the wife. Against the right of a wife to maintenance must be balanced the right of the husband to have his privacy respected; in our view the latter must prevail. We can see that it would sometimes be useful if magistrates' courts could issue a warrant to bring the husband before the court on a wife's application for a maintenance order. We could not, however, recommend that they should be given this power. It is a very serious matter to arrest a man; and it would not be right to allow this to be done before he has had an opportunity to put forward a defence to his wife's allegations. In our opinion, therefore, the present powers of the court to issue a warrant in connection with matrimonial proceedings go as far as is desirable. If, after the summons has been served on the husband, he does not appear at the hearing, the court can then, subject to certain conditions, adjourn the case and issue a warrant. As we have said, it can also issue a warrant in enforcement proceedings. In the former instance, however, the husband has neglected to take an opportunity to defend himself; in the latter, the husband has defaulted in payments under an order which has established the commission of a matrimonial offence.

1149. As the main object of the second proposal would appear to be to obtain the help of the police in tracing the man, we considered whether we could recommend that the police should be required to give their assistance in trying to find him, without, however, giving them any authority to arrest him. We concluded that it would be inexpedient, especially at the present time, to add to the duties of the police that of making a special search for a missing husband in order to enable a wife to start matrimonial proceedings.

1150. We have rejected the proposal to give the court power to remand the defendant in custody in enforcement proceedings. To confer such a power would in our opinion constitute an unjustifiable interference with the liberty of the subject.

⁴⁸ The Gorell Commission also suggested that magistrates' courts should have this power, in cases of desertion (Cd. 6478, paragraph 191).

Extension of legal aid to magistrates' courts

1151. We consider that it would be desirable that legal aid should be available for taking matrimonial proceedings in magistrates' courts, since parties who are unable to afford legal representation may sometimes be at a disadvantage in presenting and, more particularly, in defending their case. We accordingly recommend that the provisions of the Legal Aid and Advice Act, 1949, dealing with legal aid for matrimonial proceedings in magistrates' courts, should be implemented as soon as possible, with the introduction of such safeguards as may be necessary to prevent abuses. We hope that when this recommendation is given effect careful consideration will be given to making the best use of the services of probation officers in trying to bring about reconciliations.

Collection of statistics in magistrates' courts

1152. Our attention was drawn to certain gaps in the statistical information in respect of matrimonial proceedings in magistrates' courts, which is given each year in the Criminal Statistics. Thus, the grounds on which the orders were made are not shown; the total number of separation orders made is not given; the total number of orders in force throughout England and Wales at the time of making the annual return is not made available.

1153. There would be some advantage in having fuller statistical information about matrimonial proceedings in magistrates' courts if this could be readily provided. But we were informed that to collect and tabulate this information would involve a good deal of extra work, additional clerical help in many courts and considerable expense. Our conclusion is that, in present circumstances, the value of the additional information would not be sufficient to justify the work and expense involved in obtaining it.

PART XV

THE LAW PROHIBITING MARRIAGE WITH CERTAIN RELATIONS BY KINDRED OR AFFINITY

1154. Our terms of reference enjoin us to consider whether any alteration should be made in the law prohibiting marriage with certain relations by kindred or affinity.

THE PRESENT POSITION

1155. The greater part of the law of England relating to solemnisation of marriage is now consolidated in the Marriage Act, 1949, Section 1 of which makes void the marriage of persons within the prohibited degrees of kindred and affinity set out in Part I of the First Schedule to the Act. The law of Scotland, which is the same in this respect as the law of England, rests on the Act of the Scots Parliament, 1567, c. 15.

1156. Certain statutory exceptions to the prohibited degrees of affinity were introduced by the Marriage (Prohibited Degrees of Relationship) Acts, 1907–1931, the result of which was to permit marriage between a man and his deceased wife's sister and between a woman and her deceased husband's brother and marriage between a person and a nephew or niece by marriage. The full list of statutory exceptions, which extend to Scotland, is as follows:

Deceased wife's sister.
Deceased brother's wife.
Deceased wife's brother's daughter.
Deceased wife's sister's daughter.
Father's deceased brother's wife.
Mother's deceased brother's wife.
Deceased wife's father's sister.
Deceased wife's mother's sister.
Brother's deceased son's wife.
Sister's deceased son's wife.
Deceased sister's husband.
Deceased husband's brother.

Father's deceased sister's husband.
Mother's deceased sister's husband.
Deceased husband's brother's son.
Deceased husband's sister's son.
Brother's deceased daughter's husband.
Sister's deceased daughter's husband.
Deceased husband's father's brother.
Deceased husband's mother's brother.

1157. Each of the above statutory exceptions relates only to marriage after the death of the spouse and it is expressly provided that any such marriage which is not void or voidable after the decease of any person shall be void if solemnised during the lifetime of that person. Thus, for example, a man whose marriage has been terminated by divorce cannot during the lifetime of his former wife marry his sister or aunt or niece by marriage, nor can a woman in the same circumstances marry her brother or uncle or nephew by marriage.

PROPOSALS

1158. Two main proposals were submitted to us: first, that the prohibition on marriage during the lifetime of a divorced spouse with those relations by affinity set out in paragraph 1156 should be removed. A Private Member's Bill to this effect, introduced by Lord Mancroft in the House of Lords in January, 1949, was subsequently withdrawn by the sponsor

after the Lord Chancellor had advised the House to reject it on the ground that the Government could not accept a controversial Private Member's Bill originating in the Upper House. In the evidence submitted to us by Lord Mancroft and others, the recommendations for removal of the prohibition put forward were the same as those in the Bill, in that they would extend to all relationships by affinity in respect of which marriage is now allowed after the death of one spouse; but it was clear that the prohibition which attracted most concern was that preventing a man from marrying his divorced wife's sister during the lifetime of his former wife (and a woman from marrying her divorced husband's brother during the lifetime of her former husband). Some witnesses made the proposal for relaxation in respect of this limited category only.

1159. The second proposal, made to us by a few witnesses, was that all prohibitions on marriage with relations by affinity should be abolished. This would mean that, for example, a woman would be free to marry her step-son on becoming a widow or on divorcing or being divorced by her husband. She would equally be free in the same circumstances to marry her father-in-law, or her son-in-law.

Arguments advanced by witnesses

1160. What is said in the following paragraphs, while primarily directed to the relationship between a husband and his wife's sister (or a wife and her husband's brother), may also be applied to the other relations by affinity with whom marriage is now allowed on the death of one partner of the first marriage.

1161. The view of the majority of the witnesses who commented on this issue was that just as marriage with certain relations by affinity had been made possible after the death of the spouse of the first marriage, so marriage should now be made possible with those relations after the first marriage had been terminated by divorce. Opposition to the proposal was expressed on behalf of the Church of England, and also in the oral evidence given by witnesses appointed by the General Assembly of the Church of Scotland; the Free Churches also had serious doubts about the wisdom of introducing such a provision.

1162. In the memorandum submitted by the Archbishop of Canterbury, on behalf of the Church of England, the arguments against the introduction of the provision were stated as follows:

“ . . . The family is and ought to be a secure, stable unit from which is excluded by universal custom any sex interest between its members. The person who is introduced by marriage into a family adopts as his or her own the brothers and sisters of the other partner in marriage. It is supremely important for the stability of the family unit and for the protection of its members from indulging in unlicensed thoughts or desires that there should be the strongest possible barrier against any thought or possibility of marriage with the brothers and sisters of a partner. The proposal hitherto has been for marriage with a divorced wife's sister or divorced husband's brother; but there would be no ground for excluding marriage with nieces or nephews of the divorced partner, and thus extending the area within which complications could arise.

Death is one thing: it is not likely one partner would actively desire the death of the other partner; still less that he or she would seek to cause death. If death comes, it is *ab extra* and it brings a release from

the formerly existing situation. The partner thus released may legitimately and without any threat to the family stability and in accordance with the Church's canon law seek to marry the deceased partner's brother or sister.

The ending of a marriage by divorce is an altogether different matter. It is not a natural event like death, but an unnatural and artificially caused event. It can be planned for and brought about. The possibility of marrying a divorced partner's brother or sister casts a terrible shadow backwards. The 'triangle' of emotions is taken into the circle of the family. Affections in danger of being attached to the brother-in-law or sister-in-law are no longer suppressed as improper and incapable of fulfilment. A divorce is always a possibility and the affections, being capable of fulfilment, may cease to be regarded as altogether improper and may be allowed to develop instead of being suppressed.

All this is a special danger today in those many cases where a married couple is living with 'in-laws'. Even the remote possibility of being able to marry an 'in-law' brother or sister, nephew or niece by bringing about a divorce might be enough to create suspicions and uneasiness and to jeopardise a marriage, especially under the unnatural strains caused when young married couples have to live in the home of an 'in-law'.¹

1163. It was recognised by those opposed to the proposal that in many cases, viewed in isolation, it seems natural for a man on divorce to look to his wife's sister as the person most likely to take care of his children and for whom he feels the most affection, having lost his wife. But they argued that the consequences for future marriages of removing the present prohibition must also be considered, and the situation to be looked to is rather that during marriage than that after divorce has taken place. It is true that unlicensed thoughts cannot be prevented merely by making it impossible for the husband to marry the sister-in-law. Nevertheless, the present law provides a strong emotional barrier by encouraging the natural feeling that brothers and sisters-in-law are in the same relationship as natural brothers and sisters, and there is thus less likelihood of any conscious erotic feeling or approach between them.

1164. On the other hand, those who favoured the removal of the present prohibition pointed out that by its very nature the proposal is and will in any event continue to be one of limited application, since the number of cases in which the question under consideration may become a serious issue, will always be small. Their view was that the present prohibition has virtually no effect on the emotional relationship between a husband and his wife's sister. Unlicensed thoughts may arise at the present time between such persons, but the law cannot prevent this. The risk of this element emerging is present whether it be linked to the idea of a second marriage or not. It appeared from cases actually within the experience of some of those witnesses that the present prohibition had even on occasion acted in favour of a really unscrupulous husband, who could seduce his wife's sister secure in the knowledge that under the present law it was unlikely that there could be any question of subsequent marriage with her.

1165. The question of a second marriage often arises where a husband on divorce has to make provision for the upbringing of his children. In that respect the situation is in essentials the same as that arising on the death of a man's first wife. Of that situation, in considering whether the prohibition on marriage with a deceased wife's sister should be removed, the Royal

¹ See Paper No. 16, Appendix B, Minutes of Evidence, Sixth Day.

Commission on the Law of Marriage (1848) said, "It is evident that the strongest motives exist to induce the husband to desire the assistance of the sister of the deceased wife for the management of his household, and the care of his children. Such assistance will appear to him more or less necessary according to circumstances; but in all cases where there are children of a tender age, there is a vacancy made by the death of the wife which her sister appears, above all persons, qualified to supply".

1166. A common case, cited by our witnesses, which so far as can be judged is also typical of the individual cases drawn to our attention in letters submitted by private individuals personally affected by this question, is that of a husband (sometimes temporarily abroad) whose wife forms an association with another man and leaves the children of the marriage with her sister. On being made aware of the situation on his return, the husband visits his sister-in-law's home to see his children. Quite often this is the first occasion on which he has met his wife's sister. Another case which was brought to our notice is that of the wife who is left penniless with a young family to bring up, and whose brother-in-law takes on the responsibilities of the husband who has abandoned her.

THE COMMISSION'S RECOMMENDATIONS

1167. On the evidence before us we consider, with three dissentients², that a case has been made out for the removal of the prohibition in question. Parliament has since 1907 recognised that the prohibition on marriage within these classes of relationship is not an absolute one. It does not at the present time operate in respect of marriage with a relation (coming within these classes) of a deceased spouse. We consider that the time has now come to take the further step of removing the prohibition in respect of marriage within the same classes of relations by affinity where the first marriage has ended in divorce. The evidence which we have received leads us to conclude that a substantial number of such cases exists at present, where the parties desire to marry from the best of motives but are debarred from doing so by the present prohibition. Against these cases of existing hardship we have weighed the argument that removal of the prohibition might create temptation within the family. The former consideration is based on a question of fact, but the latter leads into the realm of conjecture. We recognise that there may always be a potential risk of an attachment developing between a husband and his wife's sister. Our judgment is, however, that this possibility is and will always continue to be much less likely to occur between a man and his wife's sister than between a husband and another woman outside the family circle. The problem is thus limited to a relatively small category of persons. Where such an attachment does develop within the family group we doubt whether the presence or absence of a legal prohibition of the present kind can influence the matter to any appreciable extent.

1168. Lord Mancroft's Bill contained a proviso that marriage with a relation within the categories in question should not be permitted if the husband or wife was divorced on the ground of adultery with that relation. In his evidence Lord Mancroft said that he would not now support such a proviso, and for our part we do not favour its inclusion. We think that it might be evaded by pressure being put on the wife to get her to bring divorce proceedings on some ground other than the husband's adultery with her sister. The proviso would be arbitrary in application because it would always be possible (as it is at present in the case of the existing prohibition) for the

² Lord Morton of Henryton, Sir Frederick Burrows (whose views are set out at pp. 343-344) and Mr. Flecker.

couple to evade the prohibition by making their home in some country where marriage between them was permitted. Further, there is a risk that such a proviso would in time become a dead letter. The history of a not dissimilar Scottish provision (referred to in paragraph 1201) declaring to be null and void the marriage of a person divorced for adultery with the person with whom the adultery is declared to have been committed, lends support to this view. The provision, which was introduced by an Act of 1600, has for long been a dead letter, having been circumvented by the practice of not naming the paramour in the decree of divorce.

1169. We therefore recommend, with the same three dissentients², that in England and in Scotland it should be permissible for a man or woman whose former marriage has been dissolved to marry during the lifetime of his or her former spouse any person whom he or she could lawfully marry at the present time if that former spouse were dead.

1170. Apart from the foregoing recommendation, we see no reason to recommend any further change in the law relating to the marriage of persons within the prohibited degrees of relationship.

PART XVI

MISCELLANEOUS MATTERS

LEGITIMACY OF CHILDREN

1171. We were in some doubt whether any questions relating to the legitimacy of children fell within our terms of reference. Proposals were, however, made to us in respect of two matters, namely, the legitimation of children by the subsequent marriage of their parents and the legitimacy of children of void marriages, which are closely related to other matters coming definitely within the scope of our inquiry. We have therefore thought it desirable to examine the suggestions made to us. Our conclusions are set out below. These are based on the evidence before us, which we appreciate may not have been complete, since some witnesses may have regarded these matters as falling outside our terms of reference.

(1) LEGITIMATION BY SUBSEQUENT MARRIAGE

1172. In England, by virtue of Section 1 of the Legitimacy Act, 1926, a child is legitimated by the subsequent marriage of its parents provided that the father was domiciled in England at the time of the marriage and that neither parent was married to some other person when the child was born. Legitimation *per subsequens matrimonium* has always been part of the common law of Scotland. Under Scots law, however, a child is not legitimated by the subsequent marriage of its parents unless they were free to marry at the time of its conception.

Proposal

1173. Those witnesses who referred to the question of legitimation suggested that all children born out of wedlock should be legitimated by the subsequent marriage of their parents¹.

Arguments in support of the proposal

1174. It is argued that it is in the public interest that such children should not be stigmatised as illegitimate. Considerable suffering in later life may be entailed for the children, who, though innocent parties, under the present law are in effect penalised for the shortcomings of their parents. There is no evidence that the removal of this hardship for the child would increase the risk of an extension of promiscuous relationships. Against that hypothetical risk must be set the real benefits which legitimation would confer on the child.

1175. The present law may create considerable hardship even within a single family. For instance, of three children born to the same parents and all living in family, one may have been born while one of its parents was still married to some other person, another may have been born after that parent had been divorced but before the parents had married, and the third may have been born after the marriage of its parents. In such circumstances, the first child would remain illegitimate, the second would have been legitimated and the third would be legitimate. It is difficult to appreciate the principle, if any, which underlies the difference in status of these children, particularly as between the two children born before the parents actually married.

¹ There have been several attempts in recent years to carry through a Private Member's Bill, the principal purpose of which has been to achieve this result.

1176. Moreover, the law at present permits a man and woman who have been cohabiting illicitly to regularise their position by marriage when they become free to do so. It seems inequitable that the position of the innocent offspring of the cohabitation cannot in such circumstances be regularised. Further, it seems illogical that, while legitimation is recognised as a just and proper corollary of the subsequent marriage of the parents, the operation of the law is limited by circumstances over which the child—in whose interests the doctrine of legitimation is recognised—of necessity had no concern or control.

1177. As to the deterrent effect which the present provisions regarding legitimation by subsequent marriage may have, it seems obvious that the main deterrent influence against people entering an illicit union is the uncertainty that they will ever be free to marry. Their subsequent marriage is dependent on one of two contingencies—that the person already married will be released either by divorce or by the death of the other spouse. In comparison, the possible effect of the illicit union upon children not yet conceived would seem to be a secondary consideration.

1178. It must also be borne in mind that the law relating to adoption of children permits the adoption of an illegitimate child by one or both of his natural parents. On adoption, such a child is treated for the purposes of all parental rights and duties in relation to custody, maintenance and education as though he were a child born in wedlock, and in England (though not at present in Scotland) the child for the most part has the same rights of inheritance as if he were a lawful child of the adopter. Adoption in such cases can therefore to a considerable extent overcome the disabilities from which the illegitimate child would otherwise suffer. To that extent it is difficult to see that the prospect of illegitimacy for the children can be a major deterrent factor against entering into an illicit union. It is also difficult to see why, if parents are allowed to confer the consequences of legitimacy by the circuitous and somewhat absurd process of adopting their own children, the same result should not be achieved directly by legitimation on subsequent marriage.

Arguments against the proposal

1179. The basic argument against the proposal that in all cases children should be legitimated by the subsequent marriage of their parents is that it would result in a serious weakening in respect for marriage. It is no doubt possible to cite particular cases in which, when viewed in isolation, the present law may appear to work harshly against the children. But against the benefit which relief might afford to existing cases of hardship must be balanced the possible effects of removing the present impediment. Measures designed to relieve present hardship may result in future social evils which far outweigh any immediate and temporary benefit which they create.

1180. It is untrue to say that the principle underlying the present law is that of penalising the child or its parents. So long as marriage is held to be the voluntary union for life of one man with one woman, that conception is wholly incompatible with the provision that one or other of the parties can, during the subsistence of the marriage, beget by some other person children who may later be legitimated. This, indeed, is the essence of the objection to the proposal. Legitimacy is the status held by a lawful child of the marriage. Any departure from that conception can only be made by ignoring the essential moral principle that a man cannot, during the subsistence of his marriage, beget lawful children by another woman. It is unthinkable that the State should lend its sanction to such a step,

for it could not fail to result in a blurring of moral values in the public mind. A powerful deterrent to illicit relationships would be removed, with disastrous results for the status of marriage as at present understood. The issue is fundamental but perfectly plain. If children born in adultery may subsequently acquire the status of legitimate children, an essential distinction between lawful marriages and illicit unions disappears.

1181. The fact that an illegitimate child may be adopted and can thus acquire property rights shows that such a child need not at present be at any serious material disadvantage. It is right that it should be possible to mitigate the material consequences for the child. It is quite another thing to suggest that no distinction should be made between the lawful children of the marriage and children who were born of an adulterous union.

Conclusions of the Commission

1182. We have been unable to reach agreement on the proposal that all children should be legitimated by the subsequent marriage of their parents. Twelve² of us are opposed to it, for the reasons set out in paragraphs 1179–1181; seven³ of us consider that the law of England and of Scotland should be altered to give effect to the proposal.

1183. As we have said, the present law of legitimation in Scotland differs from that in England in that in Scotland what is looked to is whether the parents were free to marry at the date of the child's conception, whereas in England the relevant factor is the date of birth. We recognise that it is more logical to look to the date of conception rather than to the date of birth; and the present Scots law may have been practicable in the past when it was generally accepted that the period of gestation was nine months. Recent decisions of the courts have, however, resulted in the position that the period of gestation may be held to be anything from five to eleven months. It seems to us, therefore, that the present English law, which looks to the date of birth, provides a more practical rule. We are all agreed, whatever our views as stated in paragraph 1182, that, on the assumption that it should be decided not to introduce the principle that all children should be legitimated by the subsequent marriage of their parents, the present law of England should remain unchanged; and that the law of Scotland should be altered so as to provide that a child should be legitimated on the subsequent marriage of his parents if they were free to marry at the time of the child's birth.

(2) LEGITIMATION OF CHILDREN OF VOID MARRIAGES

1184. In England, if a marriage is void *ab initio*, the children of the marriage are deemed to be illegitimate. It may be noted, however, that before the Reformation, the canon law held that the child of a void marriage was legitimate where the defect rendering the marriage void was unknown to one of the parties.

1185. Under the common law of Scotland, where at the time of the marriage one or both of the parties to a putative marriage was or were ignorant of the impediment to the marriage, the children are held to be legitimate, and are entitled to the ordinary rights of succession. The ignorance must be of the existence of the impediment and not merely ignorance of the law⁴.

² Lord Morton of Henryton, Mrs. Allen, Mr. Beloe, Lady Bragg, Sir Russell Brain, Sir Frederick Burrows, Mr. Flecker, Mr. Lawrence, Mr. Mace, Mr. Justice Pearce, Lady Portal, Mr. Young.

³ Dr. Baird, Mrs. Brace, Mr. Brown, Mrs. Jones-Roberts, Lord Keith of Avonholm, Mr. Maddocks, Lord Walker.

⁴ *Purves' Trustees*, 1895, 22 R. 513; *Philp's Trustees*, 1938 S.C. 733.

1186. One witness suggested that the Scots rule be adopted in England. Others advocated that to avoid hardship to children born of a void marriage they should always be deemed to be legitimate. In our view no distinction can be drawn between children who were illegitimate from birth and children born of parents who had gone through a ceremony of marriage, both knowing at the time of an impediment which rendered the marriage void. The Scots rule, on the other hand, seems to us to be sound and we suggest that in England, as in Scotland, children born of a void marriage should be held to be legitimate where it is shown that one or both of the parents was or were ignorant of the impediment to the marriage.

THE EFFECT OF DIVORCE ON A WILL

A. ENGLAND

1187. The dissolution of a marriage does not affect the will of a party to it, unless the terms of the will expressly provide for this contingency. It was suggested to us that there are instances where, through inadvertence, the will of a person whose marriage has been dissolved is not subsequently reconsidered; and that, in consequence, on his death his former spouse takes a benefit contrary to what would have been his intention had he given his mind to the matter during his lifetime. The solution proposed was that divorce should operate automatically to revoke any will made before the filing of the petition.

1188. In our opinion, a substantial proportion of those spouses who have made a will in favour of the other spouse⁵ would not wish that spouse to receive a benefit if the marriage is subsequently dissolved. It might lead to an unfair result if, for instance, a divorced wife could, many years after the divorce, take the whole or most of the deceased's estate to the detriment of his children, simply because he had forgotten to alter the terms of his will. It is true that after a divorce has been obtained, it will quite often be suggested to a testator by his solicitor that he should consider revising his will, but it does not follow that every person consults a solicitor on that point at the time or that, if he does so, he remembers to take the solicitor's advice. Moreover, it is not a new thing for the law to make provision on behalf of the forgetful man. The law of intestate succession provides rules for the distribution of a deceased's estate based on what it is thought the average person would wish to be done with his estate. It has also been the law for some time that a person's will is (subject to one small exception) automatically revoked if he marries, unless it was expressly made in contemplation of the marriage. We consider, therefore, that it would be desirable that, on the death of a person whose marriage has been dissolved, his former spouse should not take any benefit under his will unless it is clear that he desires her to take a benefit notwithstanding the divorce.

1189. There are two ways in which this result could be achieved. In the first place, it could be provided that divorce should wholly revoke a will, just as marriage totally revokes a will made previously. Thus, if the testator did not make another will, he would die intestate. This might, however, lead to a result quite opposite to the deceased's intention. For instance, he may have made a number of bequests to friends and to old servants;

⁵ It would appear that a very high proportion of married persons leave the whole, or a substantial part, of their estate to the other spouse; see paragraph 18, Report of the Committee on the Law of Intestate Succession (Cmd. 8310).

these would fail. Again, he may have made only a small bequest, or none at all, to his wife and have given the bulk of his estate to various charities; this provision would also be invalidated. We prefer the alternative solution, which is that any bequest to or appointment in favour of the former spouse should be invalidated on divorce⁶ but that in all other respects the will should take effect; we recommend accordingly. We consider that our proposal should also apply when the marriage has been annulled.

1190. Since this proposal is designed for the forgetful or the ill-informed testator, we think that, if the testator has expressly provided in his will for what is to happen on divorce, his wishes should take precedence. If he has made no such provision but feels after the divorce that he would like to make some provision for his former spouse, he can of course do so by a new will or codicil.

1191. A bequest which lapses will normally fall into the residue of the estate. The testator may have disposed expressly of the residue, in which case the bequest to a spouse which lapses on divorce would go to the person who has been given the residue. If the residue is not disposed of by the will, it will devolve according to the law of intestate succession. It may be said that, having disposed of all his known estate by means of specific bequests, a testator is at times careless about the disposition of the residue of his estate, believing this to be of no value. A possible objection to partial revocation, therefore, is that by allowing a lapsed bequest to a divorced spouse to fall into the residue the law would not always give effect to the testator's intentions, since he might not have wished that so large a part of his estate should go to the person to whom he has bequeathed the residue. But this may happen in respect of any of the bequests in a will, if a legatee or devisee dies before the testator. We see no reason, therefore, why a lapsed bequest to a spouse should not follow the usual rules.

B. SCOTLAND

1192. In Scotland, unless the terms of the will expressly provide for what is to happen if the marriage is dissolved, they remain unaffected by a subsequent divorce. The position in this respect is the same as in England and accordingly we recommend that the proposal which we have made for a change in the law of England should apply also to Scotland.

THE RE-APPEARANCE OF A SPOUSE AFTER A DECREE OF PRESUMPTION OF DEATH

1193. Two Scottish witnesses proposed that the law should make specific provision to deal with the situation which would result from the re-appearance of a spouse who has been presumed by the court to be dead and whose marriage has been dissolved on that ground. There is no reported case of the court being called upon to deal with this situation but, from the practice followed by the court in other matrimonial proceedings, it would seem that on an application for the revocation of the decree the matter might be decided differently in England and in Scotland.

1194. In England, Section 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that no appeal from an order absolute for the dissolution of marriage may be made by any party who, having had

⁶ Including an appointment as executor.

time or opportunity to appeal from the decree *nisi* on which the order was founded, has not appealed from that decree. The cases in which the court has allowed an appeal under this section have been rare. In one case⁷, the respondent had not in fact been served with a copy of the petition, owing to the fault of the petitioner's process server. In another case⁸, where notice of the petition had been served by advertisement in selected newspapers, the court found that through the fault of the petitioner enquiries had not been made which might have resulted in tracing the respondent. If, therefore, the respondent to proceedings for presumption of death and dissolution of marriage re-appeared after the decree *nisi* had been made absolute, it would seem that he would be able to apply for the decree to be rescinded only if he could prove some defect in the arrangements for service of notice of the petition.

1195. In Scotland, a decree in absence of the Court of Session may be set aside by reduction on good ground being shown at any time before twenty years have elapsed from the date of the decree. It has been suggested⁹ that a decree of dissolution on the ground of presumption of death could be set aside in this way, by either the petitioner or the person presumed to be dead, on the ground that the basis for pronouncing it had never existed.

1196. The proposal made to us was that on the re-appearance of the spouse who has been presumed dead, the other spouse should, within a specified period, be able to apply for the decree to be reduced, thus restoring the marriage and rendering void any subsequent marriage.

1197. We have no reason to believe that this difficult situation often arises. Nevertheless, if there is doubt as to the legal position we think that the law should be made clear. In our opinion it would be undesirable to have different rules in England and Scotland. We have carefully considered all the various possibilities and we have come to the conclusion that on balance the best solution is to provide that the decree should not be capable of being set aside, after the time for appeal has elapsed, solely because the spouse presumed dead has re-appeared. We think that this conclusion is more in accord with the intentions of the legislature in granting relief on such a ground, since, as we have already pointed out (in paragraph 846), the real purpose of the proceedings is to obtain a declaration of presumption of death and the provision for the dissolution of the marriage by decree of the court is really a safeguard for the applicant in case the facts belie the presumption¹⁰.

1198. Accordingly we recommend that where in England or Scotland a spouse has obtained from the court a decree presuming the death of the other spouse and dissolving the marriage, the fact that the spouse presumed to be dead is alive, or was alive at the material time, should not of itself be a ground for applying to the court for the decree to be rescinded or reduced once the decree has become final and the time for appeal has lapsed. This would still leave it open for the decree to be attacked on any other ground available in accordance with the present practice in England and Scotland, for instance fraudulent misrepresentation by the petitioner.

⁷ *Everitt v. Everitt*, [1948] 2 All E.R. 545.

⁸ *Wiseman v. Wiseman*, [1953] P. 79.

⁹ See *Walton on Husband and Wife* (Third Edition), at p. 122.

¹⁰ See *Wall v. Wall*, [1950] P. 112.

DISABILITIES CONSEQUENT UPON DIVORCE: SCOTLAND

1199. Several witnesses suggested that two old Acts of the Scots Parliament should be repealed.

1200. The Act of 1592, c. 11, provides that if any woman who has been divorced for adultery enters into a form of marriage with the person with whom she committed adultery, or cohabits with him, it is unlawful for her to dispose of her heritable property to the prejudice of her heirs. It was said that this provision is practically never invoked and no longer serves any useful purpose.

1201. The Act of 1600, c. 20, declares to be null a marriage which is contracted by a divorced spouse with the person with whom he or she has been “declarit be sentence of the ordinar judge to have committit the said cryme and fact of adulterie”. Since it is the practice not to name the paramour in the decree of divorce, the statute is completely ineffective and, in any event, is not in accord with present-day ideas. It was suggested by the Faculty of Advocates that if the insertion of the paramour’s name in the decree were to be insisted on by the pursuer “remarkable and revolutionary consequences would follow”¹¹.

1202. We agree that there is no reason for retaining these statutes and we, therefore, recommend that the Acts of 1592, c. 11, and 1600, c. 20, should be repealed.

PROTECTION ORDER: SCOTLAND

1203. We have had evidence to show that in Scotland, as well as in England, the wife of a man who has been convicted of a sexual offence against one of the children finds it difficult to protect the children on his release from prison. We have recommended that in England conviction for such an offence should be an additional ground for obtaining a separation order in a magistrates’ court (see paragraphs 1029–1031). A spouse in Scotland should be able to secure a similar protection for the children. The appropriate court to have power to make this type of order is, in our view, the Sheriff Court. We recommend, therefore, that the Sheriff Court should have power to grant a spouse an order for protection on the ground of the conviction of the other spouse for a sexual offence against a child of either or both spouses, or a child living in family with them. The order for protection should operate in the same way as a decree of separation, except that it should be open to either spouse to apply to the court on cause shown to revoke the order at any time after twelve months from its making.

¹¹ Paper No. 71, Minutes of Evidence, Twenty-fifth Day.

CONCLUSION

1204. We set out below our principal recommendations ; for ease of reference we give separate summaries for England and for Scotland.

SUMMARY OF RECOMMENDATIONS: ENGLAND

PART I.—THE GROUNDS OF DIVORCE

The suggested new basis for divorce

(1) (Eighteen members in favour, one against.) The present law of divorce based on the doctrine of the matrimonial offence should be retained (paragraph 65).

(2) (Nine members in favour.) The principle that a marriage should be dissolved if it has irretrievably broken down (as exemplified by divorce by consent, divorce at the option of either spouse after a period of separation, or divorce on a comprehensive ground of breakdown of marriage) should not be introduced into the law (paragraphs 66 and 69).

(3) (Nine members in favour.) There should be provision for divorce in cases where, quite apart from the commission of a matrimonial offence, the marriage has broken down completely ; accordingly, where husband and wife have lived separate and apart for a period of at least seven years immediately preceding the application, it should be possible for either spouse to obtain a decree dissolving the marriage, provided that the other spouse does not object (paragraphs 67 and 70).

Note. Four of these nine members, although supporting this proposal, would prefer that either spouse should be able to obtain a dissolution of marriage on this ground, notwithstanding the other spouse's objection, if he or she could satisfy the court that the separation was in part due to the unreasonable conduct of the other spouse (paragraphs 68 and 71).

(4) (One member in favour.) A marriage should be indissoluble unless, the spouses having lived apart for not less than three years, either spouse shows that the facts and circumstances affecting the lives of the parties adversely to one another are such that it is improbable that an ordinary husband and wife would ever resume cohabitation (pages 340–341).

Note. Failing the adoption of this proposal, this member considers that the need for some principle requires that the doctrine of the matrimonial offence should be retained without the new grounds of divorce proposed in (3).

Other suggested new grounds of divorce

(5) The following should be new grounds of divorce :

- (a) wilful refusal by a spouse to consummate the marriage (instead of being a ground of nullity) (paragraph 88) ;
- (b) acceptance by a wife of artificial insemination by a donor without her husband's consent (paragraph 90) ;
- (c) the fact that a spouse is a mental defective who, by reason of his or her dangerous or violent propensities, has been detained in an institution for mental defectives for a continuous period of at least five years immediately preceding the presentation of the petition, and whose recovery from such violent or dangerous propensities is highly improbable (paragraph 92).

Suggested alterations of the present grounds of divorce

Cruelty

(6) It should no longer be necessary for the applicant to prove that he or she needs protection ; proof of past cruelty should in itself confer a right to divorce (paragraph 132).

Desertion

(7) (Fourteen members in favour, five against.) In order to encourage husband and wife to come together for a short period to find out if a lasting reconciliation can be effected, there should be a new ground of divorce constituted by two periods of desertion which together amount to at least three years, within a period of three years and one month immediately before the presentation of the petition (paragraphs 149-150). This is in addition to the present ground of divorce for one period of three years' desertion.

(8) (Fourteen members in favour, five against.) Proof of conduct of a grave and weighty nature which is such that a spouse could not reasonably be expected to continue with the conjugal life, and which has compelled that spouse to break off cohabitation, should in future raise an irrebuttable presumption that the other spouse intended to bring the married life to an end (paragraphs 155-156).

(9) Where husband and wife have separated before 1st October, 1937, in circumstances amounting to desertion on the part of one of them, the fact that before that date they entered into an agreement to live separate and apart should no longer operate to bar the deserted spouse from bringing a petition for divorce on the ground of desertion (paragraph 158).

Insanity

(10) It should still be necessary to prove that the respondent spouse is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, but

(a) care and treatment for the purpose of divorce proceedings should consist of :

(i) care and treatment in any hospital or other institution in England, Scotland, Northern Ireland, the Isle of Man or the Channel Islands, which is provided or approved, by the appropriate authority, for the treatment of mental illness (paragraph 192) ;

(ii) care and treatment in a hospital or other institution in a country other than those listed above, according to standards which are substantially the same as those in England (paragraph 209) ; and

(b) a person should be deemed for the purpose of divorce proceedings to have been continuously under care and treatment

(i) if, notwithstanding that he has been absent from the hospital or other institution, his name has been retained in its current records (paragraph 200) ; or

(ii) if, notwithstanding that he has been absent from the hospital or other institution and his name has been removed from its current records, the break in his status as a patient has not amounted at any one time to more than twenty-eight days (paragraph 201).

Sodomy and bestiality

(11) Sodomy and bestiality should be grounds of divorce at the instance of either husband or wife (paragraph 210).

Bars to relief

Collusion

(12) Collusion should be defined by statute on the basis of the following considerations:

- (i) the spouses should be restrained from conspiring together to put forward a false case or to withhold a just defence, and
- (ii) divorce should not be available if one spouse has been bribed by the other spouse to take divorce proceedings or has exacted a price from him for so doing (paragraph 234).

(13) In addition, it should be provided by statute that it should not amount to collusion if reasonable arrangements are arrived at between husband and wife, before the hearing of the suit, about financial provision for one spouse and the children, the division of the matrimonial home and its contents, the custody of, and access to, the children, and costs. It should be the duty of the petitioner to disclose any such arrangements to the court at the hearing and the parties should be able to apply to the court before or after the presentation of the petition for its opinion on the reasonableness of any contemplated arrangements. (Paragraph 235.)

Condonation

(14) An act or acts of sexual intercourse between husband and wife, after the commission of a matrimonial offence by one which is known to the other, should raise a presumption that the offence has been thereby condoned, which presumption may be rebutted by sufficient evidence to the contrary (paragraph 241).

(15) (Fourteen members in favour, five against.) Where one spouse has committed adultery, or has treated the other spouse with cruelty, the spouses should thereafter be allowed a trial period, not exceeding one month, during which they could come together in an attempt to effect a reconciliation; nothing which ensues during that period should be regarded as amounting to condonation of the previous matrimonial offence (paragraphs 242–243).

Special defences

(16) The insanity of a spouse charged with cruelty in matrimonial proceedings should not be a good defence (paragraph 256).

(17) Desertion should be deemed not to have been interrupted by the insanity of the deserting spouse if it appears to the court that the desertion would probably have continued if he had not become insane (paragraph 260).

PART II.—NULLITY OF MARRIAGE

(18) The statutory provision which makes it a ground of nullity that either party to the marriage was at the time of the marriage of unsound mind should be re-drafted to make clear that it refers only to a person who has gone through a ceremony of marriage with a full understanding of the nature of that ceremony and of what it imports but who nevertheless was of unsound mind at the time (paragraph 275).

(19) The statutory provision which makes mental deficiency a ground of nullity should be amended by the insertion of a specific reference to Section 1 of the Mental Deficiency Act, 1913 (paragraph 278).

(20) Wilful refusal by a spouse to consummate the marriage should no longer be a ground of nullity (but should instead be a ground of divorce) (paragraph 283).

(21) The present time-limit of one year from the date of the marriage for bringing proceedings for nullity on the grounds set out in Section 8 (1) (b), (c) and (d) of the Matrimonial Causes Act, 1950, should be modified by giving the court a discretionary power to waive the time-bar where it is satisfied that there are special circumstances which justify an exception being made (paragraph 285).

(22) The fact that the parties to a marriage have consented to the artificial insemination of the wife, with the seed of either the husband or a donor, should be a bar to proceedings by either spouse for nullity on the ground of impotence (paragraph 287).

PART III.—OTHER REMEDIES

Judicial separation

(23) The following should no longer be grounds for judicial separation: desertion, insanity, failure to comply with a decree for restitution of conjugal rights (paragraph 316).

(24) (Eighteen members in favour, one against.) Artificial insemination of the wife by a donor without the husband's consent should be made an additional ground of judicial separation (paragraph 318).

PART IV.—MARRIAGE GUIDANCE AND CONCILIATION

(25) A suitably qualified body should be set up at an early date charged with the review of the marriage law and the existing arrangements for pre-marital education and training (the consideration of which we consider to be outside our terms of reference) (paragraph 330).

(26) The State should give every encouragement to the existing agencies engaged in matrimonial conciliation, as well as to other agencies which may be approved in the future; it should not define any formal pattern of conciliation agencies or set up an official conciliation service (paragraph 341).

(27) Exchequer grants to voluntary agencies towards the cost of training and central administrative expenditure should continue to be made (paragraph 343).

(28) The increase in expenditure which will be called for in the next few years in order to provide better training facilities and to meet any resulting additional expenditure at central headquarters should be met by an increase in the Exchequer grants (paragraph 344).

(29) Local authorities should be empowered to make contributions without Ministerial approval towards agencies engaged in matrimonial conciliation; any such expenditure approved by the appropriate Minister should rank for a specific Exchequer grant to the extent of not less than 50 per cent. (paragraph 349).

(30) As an aid to the promotion of reconciliation, the provisions of the Legal Aid and Advice Act, 1949, relating to legal advice should now be brought into operation (paragraph 356).

(31) Facts learnt by a marriage guidance counsellor in the course of conciliation work should be inadmissible as evidence in any subsequent matrimonial proceedings between the spouses (paragraph 358).

PART V.—CHILDREN

Children in matrimonial proceedings

High Court

(32) In every case of divorce, nullity or judicial separation the court must be satisfied that the arrangements proposed for the care and upbringing of any children of the marriage or any other children (as defined in (36)) are the best which can be devised in the circumstances; until the court is satisfied, the decree *nisi* must not be made absolute: provided that, if there are exceptional circumstances, the court may allow the decree *nisi* to be made absolute on an undertaking being given by the party who has obtained the decree to bring the question of the arrangements for the children before the court within a specified time (paragraphs 373 and 398).

(33) To enable the court to discharge this duty, the petitioner (and, if custody is contested, the respondent as well) should be required to submit to the court a written statement setting out in detail the proposed future arrangements for the care and upbringing of the children (paragraph 374).

(34) Since the court may sometimes be unable to come to a decision on the basis of the statement and evidence, provision should be made for investigation and report by a court welfare officer in such cases as the court may direct (paragraph 374).

(35) The present arrangements whereby in London there is a court welfare officer seconded from the probation service and assisted by other probation officers, should be continued and expanded. Similar arrangements should be provided in the provinces by the appointment from the probation service of a court welfare officer for each of the forty-two towns at which matrimonial cases are tried (paragraphs 388–391).

(36) The jurisdiction of the court to make orders in respect of children in matrimonial proceedings should be extended to the following additional classes of children:

- (a) illegitimate children of the two spouses;
- (b) children of either spouse (including a child adopted by either spouse), if living in family at the time when the home broke up;
- (c) illegitimate children of either spouse, if living in family at the time when the home broke up;
- (d) other children (excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up.

(Paragraphs 393–394.)

(37) The court should have power to require a local authority to receive a child into its care (paragraph 395).

(38) The court should have power, on making an order for custody, to place the children under the supervision of a court welfare officer or other suitable person for such time as it thinks fit; if supervision has been ordered, the court should have power to re-open the question of custody, at any time on its own motion (paragraph 396).

(39) Where in proceedings for divorce, nullity or judicial separation the court has refused a decree, or where the court has made an order for maintenance under Section 23 of the Matrimonial Causes Act, 1950, it should have power, on the application of either party, to make an order for custody (paragraphs 402–403).

(40) Divorce cases in which there are children under sixteen years of age should be placed in a special list of causes for hearing. This recommendation is confined to cases to be tried in London. (Paragraph 404.)

Magistrates' courts

(41) The court should have power to make an order for custody under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, in respect of the additional classes of children set out in (36) (paragraph 410).

(42) The court should have power to order continuing supervision for such period as it thinks fit, after an order for custody has been made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949; where supervision has been ordered, the court should have power to re-open the question of custody at any time on its own motion (paragraph 410).

(43) The court should have power to award custody of a child to either parent or to a third party (including a power to require a local authority to receive the child into its care) when an application for custody is made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949 (paragraph 411).

Removal of children out of the country

(44) On or at any time after the institution of matrimonial proceedings in the High Court, either spouse, or the guardian of any children in respect of whom the court has jurisdiction to make orders in the course of such proceedings, or any other person who has, or who wishes to obtain, the custody or control of such children under an order of the court, should be able to apply *ex parte* to a judge for an injunction to prohibit the removal of the children out of the jurisdiction, or from the control of the person in whose charge they are, without an order of the court (paragraph 423).

(45) An order awarding the custody of children to a spouse or to some third person, made in the course of matrimonial proceedings in the High Court in England or in the Court of Session or a Sheriff Court in Scotland, should be enforceable in Scotland or England, as the case may be, without further enquiry within a period of one year from the date when the children were last in the country in which the order was made; during that period an application relating to the custody of the children should be made only to the court which granted the original order; after that period has elapsed, any court of either country which is competent to assume jurisdiction should be able to entertain an application relating to the children and should have a complete discretion to make such order as it thinks fit (paragraph 427).

PART VI.—DAMAGES AND COSTS

Damages

(46) A wife should be given the same right to claim damages from an adulteress as her husband has to claim them from an adulterer (paragraph 434).

Costs

(47) In respect of liability for the costs of matrimonial proceedings husband and wife should now be treated on exactly the same footing (paragraph 458).

(48) The wife's costs of bringing or defending matrimonial proceedings should no longer be regarded as necessities for the provision of which her husband is liable (paragraph 459).

(49) The special practice of the Divorce Division whereby a wife may obtain from the court an order that her husband should provide security for her costs of a matrimonial suit, or of an interlocutory application in connection therewith, should be abolished (paragraph 459).

(50) It should be presumed, until the contrary has been proved, that the co-respondent committed adultery with the respondent in the knowledge that she was a married woman. The same presumption should arise when a claim for costs is made by a wife against the woman named in her pleading. (Paragraph 462.)

PART VII.—MAINTENANCE

Principles of liability

Liability of the husband

(51) If, after a marriage has been dissolved or annulled, the wife marries again, then, subject to any agreement between the parties to the contrary, any order for her maintenance made by the High Court (including an order for a secured provision) or by a magistrates' court should automatically cease to have effect. Where an order has not been made, the wife's re-marriage should extinguish her right to claim maintenance from her former husband in the future. (Paragraph 496.)

(52) A wife who has filed a petition for divorce against her husband on the ground of his incurable insanity should be able to apply to the court for an order that provision be made for her out of her husband's estate (paragraph 497).

Liability of the wife

(53) In matrimonial proceedings in the High Court, the husband should be placed on the same footing as the wife in respect of the right to apply for financial provision (paragraph 499).

(54) A husband should also be able to apply to the High Court or to a magistrates' court for a maintenance order against his wife on the ground that he is destitute and unable to support himself and that his wife, having means more than reasonably sufficient for her own support, has failed to support him (paragraph 500).

Liability to support a guilty spouse

(55) (Thirteen members in favour, six against.) The court should continue to have power to order financial provision to be made for a guilty wife. The High Court should be given the same power in respect of a guilty husband. (Paragraph 502.)

Note. Six members think it wrong in principle that a husband or wife should be required to support a guilty spouse; they consider, therefore, that a guilty spouse should not have a right to apply to the court for maintenance (paragraph 503).

The time for making an order

(56) The power of the court to order a husband or wife to provide for the other spouse should be exercisable at the time of the making of a decree of divorce, nullity or judicial separation or at any time afterwards (paragraph 505).

The time for making an application

(57) In proceedings for divorce, nullity or judicial separation a claim by one spouse that the other spouse should be ordered to make provision for him or her should as a general rule be made in the petition, or answer as the case may be; but, if no claim has been made in the petition or answer,

it should be possible to apply to the court for leave to make an application after the trial. Where a claim for provision is made in a petition or answer, the documents served on the other spouse should point out that matters which would be both a defence to the application and to the matrimonial offence charged should be pleaded before the trial. (Paragraphs 509 and 511.)

The nature of the provision which can be made by the High Court

(58) Where a marriage is ended by divorce or annulment the court should have power to make orders, on the application of the husband or the wife, for periodical payments, a secured provision (for the life of the spouse in whose favour the order has been made), a lump sum payment and settlement of property, and an order varying the terms of an ante-nuptial or post-nuptial settlement; the court should be able to direct that the payment of a lump sum should extinguish the right to claim maintenance where this would be fair to both parties (paragraph 516).

(59) Where a decree for restitution of conjugal rights has been granted or an order for maintenance has been made on the ground of wilful neglect to maintain, the court should have power to make orders for periodical payments and a secured provision (for joint lives) in favour of the husband or the wife (paragraph 517).

(60) Where a decree of judicial separation has been granted, the court should have power to make orders for periodical payments only, in favour of the husband or the wife (paragraph 518).

(61) Where the marriage has been dissolved or annulled and one spouse has since died, the other spouse should have the right to apply for provision to be made for him or her out of the deceased's net estate and the court should have power to make such order as it thinks fit (paragraph 524).

(62) The High Court should be given power, on being satisfied that one spouse is missing and cannot be traced, to order, if it thinks fit in all the circumstances of the case, that provision be made for the other spouse and the children out of the income from the missing spouse's property, and for that purpose to appoint a receiver to his or her estate; the court's powers should extend to the case where the marriage has been dissolved or annulled (paragraph 529).

(63) (Eighteen members in favour, one against.) The court should have the further power, if it is shown that the income from the property is insufficient to support the spouse and children, to direct the receiver to realise sufficient of the capital for that purpose (paragraph 529).

(64) A wife (or a husband as the case may be) should be able to apply to the High Court, on or at any time within one year after the making of an order for maintenance, secured maintenance or a lump sum payment, for an order setting aside any disposition of his property made by her husband, or former husband, within a period of three years before the making of the order for financial provision; the court should have power to make such an order if the disposition of his property is shown to have been made for the purpose of defeating the wife's claims, provided that the rights of a *bona fide* purchaser will not be defeated (paragraph 534).

Maintenance for children

(65) The principle that husband and wife are jointly liable for the maintenance of the children should be followed in any matrimonial proceedings in which the question of the maintenance of children arises (paragraph 568).

(66) In matrimonial proceedings in the High Court:

- (i) if there has been a decree of divorce or nullity, the court should have power to make an order against either spouse in favour of the children for periodical payments or for a secured provision (up to the age of twenty-one) or for the settlement of property;
- (ii) if there has been a decree for restitution of conjugal rights or an order for maintenance on the ground of wilful neglect to maintain, the court should have power to make an order against either spouse in favour of the children for periodical payments or for a secured provision (up to the age of twenty-one);
- (iii) if there has been a decree of judicial separation, or in any other circumstances, the court should have power to make an order against either spouse in favour of the children for periodical payments (up to the age of twenty-one).

(Paragraph 570.)

(67) In matrimonial proceedings the court should have power to order one or other spouse, or both spouses, to make separate provision for the support of the following additional classes of children:

- (i) illegitimate children of the two spouses;
- (ii) children of either spouse (including a child adopted by either spouse), if living in family at the time when the home broke up;
- (iii) illegitimate children of either spouse, if living in family at the time when the home broke up;
- (iv) other children (excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up.

(Paragraph 575.)

(68) A magistrates' court should be given power to make an order in proceedings under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, for the maintenance of a child who is sixteen years of age or over to enable that child to undergo a course of education or training, although no previous order has been made (paragraph 578).

PART VIII.—ENFORCEMENT OF MAINTENANCE ORDERS MADE IN THE HIGH COURT

Registration in a magistrates' court of a maintenance order made in the High Court

(69) It should be possible for an order for unsecured maintenance made in the High Court to be registered in a magistrates' court and thereafter to be dealt with as to collection of the payments and enforcement of arrears in exactly the same way as if it had been made originally by a magistrates' court (paragraph 582).

(70) An order for an amount of up to £5 per week for a wife or of up to £1 10s. per week for each child should be sent as of course for registration in the appropriate magistrates' court, unless the High Court directs to the contrary; either party should be allowed to put before the High Court reasons why the order should not be so registered (paragraph 583).

(71) The High Court should have power at the time of making a maintenance order for an amount in excess of £5 per week for a wife or £1 10s. per week for a child to direct that the order should be registered in the appropriate magistrates' court (paragraph 584).

(72) It should be open to either party to apply at any later date for an order to be registered or for a registered order to be taken off the register (paragraph 585).

(73) An application to vary or discharge a registered order should be made in the first place to a magistrates' court in accordance with the procedure which at present governs applications for variation or discharge of orders made in a magistrates' court; except that where the amount which the court is to be asked to order is beyond the limit of the jurisdiction of a magistrates' court, the order should be sent back to the High Court and the application for variation made to that court (paragraph 586).

(74) On the hearing of an application for variation or discharge or enforcement in respect of a registered order, a magistrates' court should have power to send the order and application back to the High Court if it thinks fit (paragraphs 585 and 586).

Burden of proof of means to pay

(75) In proceedings by way of judgment summons in the High Court or the county court for the enforcement of a maintenance order made in the Divorce Division, the burden of proof should rest on the debtor, as in proceedings for enforcement in a magistrates' court, to show that his failure to pay was not due to his wilful refusal or culpable neglect (paragraph 590).

Issue of writs of execution

(76) On an application for the issue of a writ of execution in respect of arrears alleged to have accrued under a maintenance order, the court should have a discretion to refuse the application if there is an outstanding application for variation or discharge of the order (paragraph 592).

Recovery of arrears of maintenance from the estate of a deceased person

(77) Where payments of maintenance under an order of the High Court in matrimonial proceedings are in arrear at the date of death of the person who has been ordered to make them, the court should have power, on the application of the person to whom the payments were due, to order that the sum owing be treated as a legal debt against the deceased's estate, if it considers this reasonable in all the circumstances (paragraph 594).

PART IX.—PROPERTY RIGHTS BETWEEN HUSBAND AND WIFE

The matrimonial home and its contents

(78) (Eighteen members in favour, one against.) If one spouse has left the other spouse in the matrimonial home

(a) he or she should not be able to turn out the other spouse or take away any of the essential contents of the home without an order of the High Court or county court; and

(b) the other spouse should be able to apply to the High Court or county court for an order restraining (for such period as the court thinks fit or until further order) that spouse from disposing of any interest in the home or in the essential contents, or surrendering the tenancy; the order, when in restraint of the spouse disposing of any interest in the home or surrendering the tenancy, should be capable of registration as a charge on the land; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation (paragraphs 667-675, 681 and 685).

(79) (Eighteen members in favour, one against.) If one spouse has left the other spouse in the matrimonial home and has then failed to pay instalments under a mortgage, or under a hire purchase agreement in respect of any of the essential contents of the home, the person to whom such instalments are due should be bound to accept payment if tendered by that other spouse; either spouse should then be able to apply to the court at any time for an order as to the disposition of the house or the contents and the court should have power to make such order as it considers reasonable in the interests of both parties in the particular circumstances (paragraphs 676-681 and 686).

(80) (Eighteen members in favour, one against.) On the application of a husband or a wife who has obtained a decree of divorce, nullity or judicial separation, the court should have power to make one or more of the following orders:

- (i) An order allowing the applicant to reside until further order in the matrimonial home if this is owned by the other spouse (or is jointly owned by the spouses); the order should be capable of registration as a charge on the land; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation.
- (ii) An order substituting the applicant as tenant if the tenancy of the matrimonial home is in the name of the other spouse and is a dwellinghouse to which the Rent Restriction Acts apply (or as sole tenant if there is a joint tenancy). The landlord should have a right to be heard on the application, to appeal, and to apply at any time for cancellation of the order.
- (iii) An order providing for an equitable division between the husband and the wife of the entire contents of the matrimonial home (including any articles being bought on hire purchase); in making such an order on a decree of divorce or nullity, the court should be able to transfer ownership (or the rights under a hire purchase agreement) in any articles from one spouse to the other but on a decree of judicial separation the court should be able to award the use only, and until further order, to the one spouse of any articles owned by the other.

The recommendation in (79) should be extended to apply to a spouse who has obtained an order allowing him or her to occupy the matrimonial home. (Paragraphs 687-695 and 697.)

(81) (Eighteen members in favour, one against.) On the institution of proceedings for divorce, nullity or judicial separation, the court should have power, on the application of a party seeking a decree in his or her favour, to grant an injunction until further order against the other party restraining her or him from disposing of any interest in the home or its contents; the order, when in restraint of the spouse disposing of any interest in the home or surrendering the tenancy, should be capable of registration as a charge on the land; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation (paragraph 698).

Savings from housekeeping money

(82) Savings made from money contributed by either the husband or the wife or by both for the purpose of meeting housekeeping expenses (and any investments or purchases made from such savings) should be deemed to belong to husband and wife in equal shares unless they have otherwise agreed (paragraph 701).

Presumption of advancement

(83) If a wife purchases property or makes an investment in her husband's name, it should be presumed that she is making a gift to him (paragraph 703).

Married Women's Property Act, 1882

(84) The remedies given to the wife by Section 12 of the Married Women's Property Act, 1882, as against her husband, for the protection and security of her property, should also be conferred on the husband, as against his wife, for the protection and security of his property (paragraph 704).

(85) In dealing with disputes relating to property between husband and wife under Section 17 of the Married Women's Property Act, 1882, the court should be able to order one spouse to pay the other spouse a sum of money in compensation for the loss of an interest in property to which the other spouse has been able to establish a title, or to order a sale of the property in dispute (paragraph 705).

Benefits under the National Insurance Scheme

(86) Provision should be made to allow a wife who has divorced her husband to use the contributions which he made under the National Insurance Scheme, during the marriage, to help her to qualify for a retirement pension on reaching pensionable age (paragraph 713).

(87) When the children are living with their mother, it should be made possible for her to draw an allowance for them, under the National Insurance Scheme, if her former husband dies and in consequence she is deprived of the money which he has been contributing for the children's support (paragraph 714).

PART X.—VOLUNTARY AGREEMENTS FOR SEPARATION OR MAINTENANCE

(88) As a general rule maintenance agreements (including the financial terms in a separation agreement) should be binding and enforceable on the parties to them ; if, however, owing to fresh circumstances the terms regulating the financial position of the parties have become inequitable, either party should be able to apply to the Divorce Division of the High Court or to a magistrates' court for an order varying the agreement (paragraph 727).

(89) On an application, the High Court should have power

(i) to cancel any or all of the financial terms ;

(ii) to vary any of those terms ;

(iii) to make an order providing for the maintenance of one party (or of the children) by the other party (paragraph 729).

The jurisdiction of the court should be based on the fact (a) that the parties are both domiciled in England, or (b) that the parties are both resident in England (paragraph 731).

(90) On an application, a magistrates' court should have power to deal only with those terms of the agreement which provide for the payment of maintenance by one party to the other (whether for that party's own benefit or for the benefit of the children) ; the power of cancelling or varying the terms of the agreement or substituting an order should be exercisable only if (a) the provision which the court is being asked to consider is within its financial limits, and (b) it is not being asked to make an order the effect of which would be to provide for the payment of an amount

outside its financial limits (paragraph 730). The jurisdiction of the court should be based on the fact that the parties are either both domiciled or both resident in England and that one of the parties is resident within the court's district (paragraph 731).

PART XI.—THE COURT WHICH SHOULD HAVE JURISDICTION OVER MATRIMONIAL CAUSES

(91) The High Court should continue to exercise exclusive jurisdiction in divorce, such jurisdiction to remain in the Probate, Divorce and Admiralty Division (paragraphs 742–754).

(92) Steps should be taken as soon as possible to enable all divorce cases to be tried by judges of the High Court (paragraphs 742 and 755–760).

PART XII.—THE BASIS OF MATRIMONIAL JURISDICTION AND THE RECOGNITION OF THE JURISDICTION OF OTHER COUNTRIES

Note. The principal recommendations of the Commission are summarised in Appendix IV.

PART XIII.—THE ADMINISTRATION OF THE LAW

Children

(93) A husband or wife should be free to raise the question of paternity of a child at any relevant stage in matrimonial proceedings unless that question has been raised and decided by the court previously; in this connection, an award of custody by the court should not carry with it any implication of paternity if the question of paternity has not been argued specifically before the court at the time of the custody proceedings (paragraph 926).

(94) If in the course of matrimonial proceedings in the High Court the court is of opinion that the children ought to be separately represented for the better protection of their rights or interests, it should have the power to require this to be done (paragraph 927).

Evidence

(95) Proof of a finding of adultery against a party to matrimonial proceedings in a court of competent jurisdiction in the United Kingdom should be received as *prima facie* evidence of his or her adultery in subsequent matrimonial proceedings (paragraph 931).

(96) Proof of a conviction by a court of competent jurisdiction in the United Kingdom for bigamy or for rape or other sexual offences should be received as *prima facie* evidence in matrimonial proceedings of the commission of the act or acts of which the offender has been found guilty (paragraph 931).

Note. One member considers that proof of a conviction on indictment for these offences should be conclusive evidence.

(97) Proof that a person has entered into a bigamous marriage, whether by production of a certificate of conviction for bigamy or by any other means, should raise a rebuttable presumption in matrimonial proceedings that the person has committed adultery (paragraph 932).

(98) The provisions of Section 32 (3) of the Matrimonial Causes Act, 1950, relating to the cross-examination of witnesses as to their own adultery, should be repealed (paragraph 935).

Pleadings

(99) The court should have a discretion to allow a petition to be filed which does not disclose the petitioner's address, provided that the address is disclosed to the court in some other way (paragraph 943).

(100) The full form of wording contained in Rule 4 (3) of the Matrimonial Causes Rules, 1950 (which requires a petition to conclude, if appropriate, with a prayer for the exercise of the court's discretion notwithstanding the petitioner's adultery during the marriage) should be used (paragraph 944).

(101) Where a wife asks for divorce or judicial separation on the ground of adultery, she should be required to make the "woman named" a party to the suit unless she is excused by the court on special grounds from so doing (paragraph 946).

The Queen's Proctor

(102) The practice of pronouncing a decree *nisi* should be retained and the office of Queen's Proctor should remain (paragraph 954).

(103) The period which must normally elapse before a spouse who has obtained a decree *nisi* can apply for it to be made absolute should be increased from six weeks to three months (paragraph 958).

(104) A spouse against whom a decree *nisi* has been pronounced should be at liberty at any time after three weeks from the earliest date on which the other spouse could have applied for the decree *nisi* to be made absolute, to apply to the court for that purpose (paragraph 959).

(105) Where it is considered desirable that a decision of the Divorce Division or of the Court of Appeal, given in matrimonial proceedings and involving a point of law of exceptional public interest, should be reviewed by a higher court, then, provided that none of the parties intends to appeal from the decision, or that the time for appeal has elapsed, the Queen's Proctor (under the direction of the Attorney-General) should be able to bring before the appropriate appellate court a consultative case based on the circumstances of the actual case in the court below; the decision in the consultative case should not be binding on the parties to the actual case, but in all other respects should carry the authority of the tribunal which gave it (paragraph 968).

PART XIV.—MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

The relief provided by magistrates' courts

(106) The substantive law with regard to the jurisdiction and powers of magistrates' courts should be codified (paragraph 1018).

Application for relief

(107) The relief available to a husband should be substantially the same as that available to a wife (paragraph 1020).

(108) In addition to the grounds on which a husband may at present apply for an order or orders, he should also be able to apply if:

- (i) his wife has been convicted summarily of an aggravated assault upon him within the meaning of Section 43 of the Offences against the Person Act, 1861;

- (ii) his wife has been convicted on indictment of an assault upon him and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months;
- (iii) his wife has deserted him;
- (iv) his wife has been guilty of persistent cruelty to him;
- (v) his wife has a venereal disease and, knowing this, permits intercourse, and he is ignorant of the fact. (Paragraph 1023.)

(109) Proceedings on the ground of adultery should have to be taken within six months from the date on which the adultery first became known to the complainant (paragraph 1026).

(110) In its application to matrimonial proceedings in magistrates' courts the definition of drunkenness in Section 3 of the Habitual Drunkards Act, 1879, should be widened to include the case of the man or woman who by reason of constant drinking or drug-taking renders life intolerable to his or her spouse (paragraph 1028).

(111) Conviction for a sexual offence by one spouse against a child of either or both spouses, or a child living in family with them, should be an additional ground for obtaining an order or orders (paragraph 1029).

(112) Condonation, connivance, collusion and conduct conducing should, in so far as they are appropriate, constitute bars to the making of an order on an application made on any of the grounds (paragraph 1032).

Orders which may be made

(113) (Fifteen members in favour, four against.) The court should have power to discharge a separation order on the application of the spouse against whom it was made, if twelve months or more have elapsed from the making of the order and the court is satisfied that it is no longer reasonable to keep it in force (paragraph 1037).

Note. The four dissenting members agree, however, to this recommendation applying to a separation order made on the proposed new ground of conviction for a sexual offence against a child.

(114) Where a wife has set up a separate household under the same roof as her husband, he should be liable to make payments under any order for maintenance which she has obtained, and the order should be enforceable (paragraph 1041).

(115) (Eighteen members in favour, one against.) If a wife obtains an order on the ground of her husband's wilful neglect to provide reasonable maintenance for her (or the children), her husband should be liable to make payments under the order, and it should be enforceable, notwithstanding that husband and wife are living together in circumstances amounting to full cohabitation; in such a case the court should order that payment be made direct to the wife, unless it considers that, in the particular circumstances, it would be preferable that payment should be made to the court collecting officer; it should be open to the husband to apply to the court at any time for the order to be discharged on the ground that the circumstances are such as to warrant its discontinuance (paragraphs 1049-1050).

(116) If a wife who has obtained a maintenance order leaves the United Kingdom, after one calendar month the husband's liability to make payments should be suspended for so long as she stays away; if she remains out of the United Kingdom for more than six calendar months from the end of the period of one month, the husband should be able to apply to the court for the order to be discharged and, on notice of the application being given to the wife by the court by registered letter to her last known

address, the court should have power to discharge the order if it considers this reasonable in all the circumstances; the wife should be able to apply to the court for an extension of time (paragraph 1052).

(117) If a husband has obtained a separation order against his wife, on any of the grounds available, the court should have power to order that he should pay her maintenance to an amount not exceeding £5 weekly (paragraph 1054).

(118) In matrimonial proceedings the court should have power to order the husband or the wife or both of them, as may be appropriate, to pay maintenance for the children (paragraph 1055).

(119) The court should have discretion to refuse to discharge a wife's maintenance order if it considers that the husband has connived at her adultery or that his conduct has in any way conduced to it (paragraph 1057).

(120) When a maintenance order lapses on re-marriage (see (51)), any provision in that order for custody and maintenance of the children should remain in force unless the court otherwise directs (paragraph 1058).

(121) Where matrimonial proceedings are pending in the High Court a magistrates' court should be able to make an interim order for maintenance, which should operate until the proceedings have been terminated (paragraph 1061).

(122) The court should have power to make an interim order for maintenance notwithstanding that it has made up its mind on the facts (paragraph 1063).

(123) (Eighteen members in favour, one against.) Either spouse should be able to apply to the court for a declaration that the other spouse has deserted him or her (paragraph 1064).

(124) Where the court makes a separation or a maintenance order, it should in addition be able, if it thinks a useful purpose would be served, to bind over either or both spouses, with or without sureties, to be of good behaviour; the court should also be able to make such an order where it dismisses the application for a separation or a maintenance order because the ground of complaint is not established (paragraph 1065).

Constitution of the court dealing with matrimonial cases and the conditions of hearing

(125) Steps should be taken to ensure that in all courts the work of hearing domestic proceedings is handled by itself and apart from the other work of the court (paragraph 1079).

(126) The court should have power to treat an application for variation of an order as a domestic proceeding, if it thinks fit, including an application made in the course of proceedings for enforcement (paragraph 1083).

(127) All applications for leave to issue a summons should be made to a magistrate sitting as an "applications court" (paragraph 1086).

Enforcement of maintenance orders

(128) It would be inadvisable to introduce any system of attachment of wages (paragraph 1107).

(129) (Seventeen members in favour, two against.) Committal to prison should not cancel the arrears of maintenance in respect of which the imprisonment was imposed (paragraph 1108).

(130) Where a husband defaults in payments under a suspended committal order, he should be given notice in writing by the court that, unless he applies to the court within, say, four days, he will be committed to prison (paragraph 1110).

(131) Where payments of maintenance under an order of a magistrates' court are in arrear at the date of death of the person who has been ordered to make them, the court should have power, on the application of the person to whom the payments were due, to order that the sum owing be treated as a legal debt against the deceased's estate, if it considers it reasonable in all the circumstances to do so (paragraph 1111).

(132) Where a maintenance order has been registered in England in a magistrates' court under the provisions of Section 1 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, the court should have the same power to vary or discharge the order as it already has in respect of an order confirmed by it under Section 4 of the Act of 1920 (paragraph 1113).

Procedural matters

(133) An application for variation, revival or discharge of a maintenance order, which has not been made to the court to which the payments are required to be made, should be referred to that court for it to determine where the application should be heard (paragraph 1117).

(134) The court which is to hear an application for variation, revival or discharge should have power to authorise the taking of, and to accept in evidence, a sworn statement or a statutory declaration as to the means of a party if it appears that unnecessary hardship or expense would be caused by requiring the personal attendance of a party or a witness (paragraph 1118).

(135) When the court for the district in which the husband is living takes over enforcement proceedings from the court to which payments under the order are being made, the order should be varied so as to make the court which is enforcing the order the court to which payments must henceforth be made (paragraph 1120).

(136) Notice of an allegation of adultery should be sent by the court by registered post to the last known address, if any, of the third person; that person should then have the right to appear and defend himself or herself against the charge (paragraph 1123).

(137) The court should have power to order a re-hearing of a case if it is shown that the complaint was originally dealt with in the defendant's absence by reason of a misunderstanding about the date or time of the hearing or of the fact that the summons did not reach him or her before the hearing (paragraph 1125).

Appeals

(138) (Sixteen members in favour, three against.) No change should be made in the present procedure whereby an appeal from the decision of a magistrates' court in a matrimonial case has to be made to a Divisional Court of the Divorce Division (paragraph 1134).

Note. Three members consider that there should be a right of appeal in such cases to quarter sessions by way of a re-hearing.

(139) It is desirable that there should be available to the Divisional Court a complete record of what has been said in the magistrates' court, taken either by a shorthand writer or by some form of recording machine (paragraph 1136).

(140) The duties of magistrates' clerks in respect of appeals should be set out in a Rule of Court (paragraph 1137).

(141) The result of an appeal from a decision of a magistrates' court should be notified to that court (paragraph 1138).

(142) If, on an appeal, the Divisional Court decides to send the case back to the magistrates' court for a re-hearing, it should have power to make an interim order for maintenance (paragraph 1139).

Concurrent jurisdiction with the Divorce Division of the High Court

(143) No change is recommended in the principles determining the assumption by magistrates' courts of a jurisdiction concurrent with that of the Divorce Division; for the avoidance of doubt, however, it should be made clear that a magistrates' court has power to deal with an application for custody if neither party is asking for custody in proceedings in the Divorce Division (paragraphs 1143-1145).

Miscellaneous matters

(144) The provisions of the Legal Aid and Advice Act, 1949, dealing with legal aid for matrimonial proceedings in magistrates' courts, should be implemented as soon as possible, with the introduction of such safeguards as may be necessary to prevent abuses (paragraph 1151).

PART XV.—THE LAW PROHIBITING MARRIAGE WITH CERTAIN RELATIONS BY KINDRED OR AFFINITY

(145) (Sixteen members in favour, three against.) It should be permissible for a man or woman whose former marriage has been dissolved to marry during the lifetime of his or her former spouse any person whom he or she could lawfully marry at the present time if that former spouse were dead (paragraph 1169).

PART XVI.—MISCELLANEOUS MATTERS

(146) (Twelve members in favour, seven against.) There should be no change in the present law whereby a child can be legitimated by the subsequent marriage of its parents only if neither parent was married to some other person when the child was born (paragraph 1182).

Note. (i) Seven members consider that all children born out of wedlock should be legitimated by the subsequent marriage of their parents. (ii) The Commission's conclusions on this subject are subject to the reservation that the evidence on which they are based may not have been complete (see paragraph 1171).

(147) Children born of a void marriage should be held to be legitimate where it is shown that one or both of the parents was or were ignorant of the impediment to the marriage (paragraph 1186).

(148) Any bequest to or appointment in favour of one spouse contained in the will of the other spouse should be invalidated if the marriage is subsequently dissolved or annulled, unless the will contains express provision to the contrary (paragraphs 1189-1191).

(149) Where a spouse has obtained from the court a decree presuming the death of the other spouse and dissolving the marriage, the fact that the spouse presumed to be dead is alive, or was alive at the material time, should not of itself be a ground for applying to the court for the decree to be rescinded once the decree has become final and the time for appeal has lapsed (paragraph 1198).

SUMMARY OF RECOMMENDATIONS: SCOTLAND

PART I.—THE GROUNDS OF DIVORCE

The suggested new basis for divorce

(1) (Eighteen members in favour, one against.) The present law of divorce based on the doctrine of the matrimonial offence should be retained (paragraph 65).

(2) (Nine members in favour.) The principle that a marriage should be dissolved if it has irretrievably broken down (as exemplified by divorce by consent, divorce at the option of either spouse after a period of separation, or divorce on a comprehensive ground of breakdown of marriage) should not be introduced into the law (paragraphs 66 and 69).

(3) (Nine members in favour.) There should be provision for divorce in cases where, quite apart from the commission of a matrimonial offence, the marriage has broken down completely; accordingly, where husband and wife have lived separate and apart for a period of at least seven years immediately preceding the application, it should be possible for either spouse to obtain a decree dissolving the marriage, provided that the other spouse does not object (paragraphs 67 and 70).

Note. Four of these nine members, although supporting this proposal, would prefer that either spouse should be able to obtain a dissolution of marriage on this ground, notwithstanding the other spouse's objection, if he or she could satisfy the court that the separation was in part due to the unreasonable conduct of the other spouse (paragraphs 68 and 71).

(4) (One member in favour.) A marriage should be indissoluble unless, the spouses having lived apart for not less than three years, either spouse shows that the facts and circumstances affecting the lives of the parties adversely to one another are such that it is improbable that an ordinary husband and wife would ever resume cohabitation (pages 340–341).

Note. Failing the adoption of this proposal, this member considers that the need for some principle requires that the doctrine of the matrimonial offence should be retained without the new grounds of divorce proposed in (3).

Other suggested new grounds of divorce

(5) The following should be new grounds of divorce:

- (a) wilful refusal by a spouse to consummate the marriage (paragraph 88);
- (b) acceptance by a wife of artificial insemination by a donor without her husband's consent (paragraph 90);
- (c) the fact that a spouse is a mental defective who, by reason of his or her dangerous or violent propensities, has been detained in an institution for mental defectives for a continuous period of at least five years immediately preceding the raising of the action, and whose recovery from such violent or dangerous propensities is highly improbable (paragraph 92).

Suggested alterations of the present grounds of divorce

Cruelty

(6) It should no longer be necessary for a pursuer to prove that he or she needs protection; proof of past cruelty should in itself confer a right to divorce (paragraph 132).

Desertion

(7) The requirement as to proof of willingness to adhere on the part of the pursuer throughout the three-year period of desertion should be abolished (paragraph 164).

(8) The court should have to be satisfied that the desertion has continued for a period of at least three years immediately preceding the raising of the action (paragraph 167).

(9) (Fourteen members in favour, five against.) In order to encourage husband and wife to come together for a short period to find out if a lasting reconciliation can be effected, there should be a new ground of divorce constituted by two periods of desertion which together amount to at least three years, within a period of three years and one month immediately before the raising of the action (paragraph 168). This is in addition to the ground of divorce for three years' desertion.

Intolerable conduct

(10) (Fourteen members in favour, five against.) Conduct of a grave and weighty nature on the part of one spouse, which is such that the other spouse could not in the face of it reasonably be expected to continue with the conjugal life, should be a ground of divorce at the instance of that other spouse where it has resulted in the separation of the spouses (otherwise than by agreement) for a period of three years or more, provided that the court should take into account any *bona fide* offer of amendment made by the defender before the raising of the action and should not grant a decree to a pursuer who has unreasonably rejected such offer (paragraphs 170-171).

Insanity

(11) The fact that the defender has been, for a period of five years continuously preceding the raising of the action, under care and treatment as an insane person should no longer give rise to a presumption of his or her incurability; instead, a pursuer should have to satisfy the court both that the defender is incurably insane and that he or she has been continuously under care and treatment for a period of at least five years immediately preceding the raising of the action (paragraphs 203-204).

(12) Care and treatment for the purpose of divorce proceedings should consist of:

- (i) care and treatment in any hospital or other institution in Scotland, England, Northern Ireland, the Isle of Man or the Channel Islands, which is provided or approved, by the appropriate authority, for the treatment of mental illness (paragraph 192);
- (ii) care and treatment in a hospital or other institution in a country other than those listed above, according to standards which are substantially the same as those in Scotland (paragraph 209).

(13) A person should be deemed for the purpose of divorce proceedings to have been continuously under care and treatment

- (i) if, notwithstanding that he has been absent from the hospital or other institution, his name has been retained in its current records (paragraph 200); or
- (ii) if, notwithstanding that he has been absent from the hospital or other institution and his name has been removed from its current records, the break in his status as a patient has not amounted at any one time to more than twenty-eight days (paragraph 201).

(14) In every action raised on the ground of the defender's insanity the General Board of Control should be required to furnish a report (based on an examination by its Medical Commissioners) on whether the defender is considered to be incurably of unsound mind in the light of present-day medical knowledge (paragraph 208).

Sodomy and bestiality

(15) It should be made clear, by definition, that for the purpose of the divorce law in Scotland "sodomy" includes an act between man and woman which if done between man and man would amount to sodomy; and bestiality includes intercourse by a woman with a beast (paragraph 211).

Bars to relief

Condonation

(16) An act or acts of sexual intercourse between husband and wife, after the commission of a matrimonial offence by one which is known to the other, should raise a presumption that the offence has been thereby condoned, which presumption may be rebutted by sufficient evidence to the contrary (paragraph 245).

(17) (Fourteen members in favour, five against.) Where one spouse has committed adultery, or has treated the other spouse with cruelty, or where the spouses have separated as the result of conduct on the part of one which has been such that the other could not continue with the conjugal life, the spouses should thereafter be allowed a trial period, not exceeding one month, during which they could come together in an attempt to effect a reconciliation; nothing which ensues during that period should be regarded as amounting to condonation of any previous adultery, cruelty or other conduct, or as having broken the running of the period of separation, as the case may be (paragraphs 242-243 and 246.)

Special defences

(18) The adultery of the pursuer should be a bar to a divorce on the ground of desertion only when it is shown to have conduced to the desertion, or to its continuance during the statutory period; the pursuer should be required to disclose, if such is the case, that he has committed adultery (paragraphs 250-251).

(19) The insanity of the defender should not be a good defence to a charge of cruelty in matrimonial proceedings (paragraph 256).

(20) Desertion should be deemed not to have been interrupted by the insanity of the deserting spouse if it appears to the court that the desertion would probably have continued if he had not become insane (paragraph 260).

(21) The insanity of the defender should not be a good defence to a charge based on the proposed new ground of intolerable conduct (paragraph 261).

(22) Conduct of a grave and weighty nature on the part of a spouse, which is such that the other spouse cannot reasonably be expected to continue with the conjugal life, should be a good defence to a charge of desertion (paragraph 263).

PART II.—NULLITY OF MARRIAGE

(23) A marriage should be voidable on the following new grounds :

- (a) that either party to the marriage was at the time of the marriage of unsound mind, or a mental defective within the meaning of Section 1 of the Mental Deficiency and Lunacy (Scotland) Act, 1913, or was suffering from recurrent attacks of insanity or epilepsy ;
- (b) that the defender was at the time of the marriage suffering from venereal disease in a communicable form ;
- (c) that the defender was at time of the marriage pregnant by some person other than the pursuer.

In each case the granting of decree should be subject to the proviso that the court is satisfied

- (i) that the pursuer was at the time of the marriage ignorant of the facts alleged ;
- (ii) that the action was raised within one year from the date of the marriage, except that where the court is satisfied that there are exceptional circumstances which have prevented the action from being raised within that period it may in its discretion grant decree ; and
- (iii) that marital intercourse with the consent of the pursuer has not taken place since the discovery by the pursuer of the existence of the grounds for a decree.

(Paragraph 291.)

(24) The fact that the parties to a marriage have consented to the artificial insemination of the wife, with the seed of either the husband or a donor, should be a bar to proceedings by either spouse for nullity on the ground of impotence (paragraphs 287 and 296).

PART III.—OTHER REMEDIES

Judicial separation

(25) The following should be additional grounds for obtaining a decree of separation: sodomy, bestiality and (eighteen members in favour, one against) artificial insemination of the wife by a donor without the husband's consent (paragraphs 317-318).

PART IV.—MARRIAGE GUIDANCE AND CONCILIATION

(26) A suitably qualified body should be set up at an early date charged with the review of the marriage law and the existing arrangements for pre-marital education and training (the consideration of which we consider to be outside our terms of reference) (paragraph 330).

(27) The State should give every encouragement to the existing agencies engaged in matrimonial conciliation, as well as to other agencies which may be approved in the future ; it should not define any formal pattern of conciliation agencies or set up an official conciliation service (paragraph 341).

(28) Local authorities should be empowered to make contributions without Ministerial approval towards agencies engaged in matrimonial conciliation ; any such expenditure approved by the appropriate Minister should rank for a specific Exchequer grant to the extent of not less than 50 per cent. Exchequer grants should continue to be made towards the headquarters expenditure of the Scottish Marriage Guidance Council, as co-ordinating agency ; they should also be made towards expenditure incurred on any central training courses established and maintained by the Scottish marriage guidance movement. (Paragraphs 349-350.)

(29) The Secretary of State for Scotland should examine whether arrangements can be devised to enable the services of probation officers to be made generally available to assist in conciliation ; if such a scheme is found to be practicable, the Scottish probation service should be empowered by statute to undertake conciliation work (paragraph 351).

(30) As an aid to the promotion of reconciliation, the provisions of the Legal Aid (Scotland) Act, 1949, relating to legal advice should now be brought into operation (paragraph 356).

(31) Facts learnt by a marriage guidance counsellor in the course of conciliation work should be inadmissible as evidence in any subsequent matrimonial proceedings between the spouses (paragraphs 358-359).

PART V.—CHILDREN

Children in matrimonial proceedings

Court of Session

(32) In every action of divorce, nullity or separation the court must be satisfied that the arrangements proposed for the care and upbringing of any children of the marriage or any other children (as defined in (36)) are the best which can be devised in the circumstances : until the court is so satisfied decree must not be granted ; provided that, if there are exceptional circumstances, the court may grant decree on an undertaking being given by the pursuer to bring the question of the arrangements for the children before the court within a specified time (paragraph 414).

(33) To enable the court to discharge this duty, the pursuer (and, if custody is contested, the defender as well) should be required to submit to the court a written statement setting out the proposed arrangements for the care and upbringing of the children (paragraph 414).

(34) Since the court may sometimes be unable to come to a decision on the basis of the statement and evidence, it should be empowered to obtain reports from a welfare officer (paragraph 414).

(35) In the area of each county council or town council of a "large burgh" in Scotland a welfare officer should be designated, to whom a remit could be made by the Court of Session where a report was called for in any case arising in his area. Welfare officers should be drawn from an existing statutory service or services (paragraph 416).

(36) The court should have power in proceedings for divorce, nullity or separation :

(i) to make an order in respect of children in the following additional classes :

(a) illegitimate children of the two spouses ;

(b) children of either spouse (including a child adopted by either spouse), if living in family at the time when the home broke up ;

(c) illegitimate children of either spouse, if living in family at the time when the home broke up ;

(d) other children (excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up.

(ii) to award custody to a third party (including power to require a local authority to receive a child into its care) ;

(iii) on making an order for custody, to place the children under the supervision of a welfare officer or other suitable person for such time as it thinks fit ; if supervision has been ordered, the court should be able to re-open the question of custody at any time *ex proprio motu* ;

(iv) on the application of either party, to make an order in respect of the children where decree has been refused.
(Paragraph 417.)

(37) Where the defender is in default in obedience to a decree of adherence, the court should have power to make an order in respect of the children, on the application of either party (paragraph 418).

Sheriff Court

(38) The recommendations in (32) to (35) should apply where there are children in actions of separation in the Sheriff Courts (paragraph 419).

(39) The recommendations in (36) and (37) should be extended to the Sheriff Courts (paragraph 419).

Removal of children out of the country

(40) On or at any time after the institution of matrimonial proceedings in the Court of Session or a Sheriff Court, either spouse, or the guardian of any children in respect of whom the court has jurisdiction to make orders in the course of such proceedings, or any other person who has, or wishes to obtain, the custody or control of such children under an order of the court, should be able to apply *ex parte* to a judge for an interdict to prohibit the removal of the children out of the jurisdiction, or from the control of the person in whose charge they are, without an order of the court (paragraph 423).

(41) Machinery should be introduced in Scotland (similar to that existing in England) designed as far as possible to prevent children being taken abroad in contravention of an order of the court (paragraph 424).

(42) An order awarding the custody of children to a spouse or to some third person, made in the course of matrimonial proceedings in the Court of Session or a Sheriff Court in Scotland or in the High Court in England, should be enforceable in England or Scotland, as the case may be, without further enquiry within a period of one year from the date when the children were last in the country in which the order was made; during that period an application relating to the custody of the children should be made only to the court which granted the original order; after that period has elapsed, any court of either country which is competent to assume jurisdiction should be able to entertain an application relating to the children and should have a complete discretion to make such order as it thinks fit (paragraph 427).

PART VI.—DAMAGES AND COSTS

Damages

(43) A wife should be entitled to claim damages against the woman with whom her husband has committed adultery (paragraph 436).

(44) For the purpose of determining liability for damages, it should be presumed, until the contrary has been proved, that the co-defender committed the adultery with the defender in the knowledge that she was a married woman; the same presumption should arise when a claim for damages is made by a wife (paragraph 437).

Costs

(45) In respect of liability for the expenses of matrimonial proceedings husband and wife should now be treated on exactly the same footing (paragraph 458).

(46) The wife's expenses of bringing or defending matrimonial proceedings should no longer be regarded as necessities for the provision of which her husband is liable (paragraph 459).

(47) The practice of the court of awarding interim expenses to a wife against her husband in matrimonial proceedings should be abolished (paragraph 459).

(48) In an action for divorce on the ground of adultery at the instance of a wife, the court should be able to order the woman with whom the husband is found to have committed adultery to pay part or the whole of the wife's expenses (paragraph 463).

(49) It should be presumed, until the contrary has been proved, that the co-defender committed adultery with the defender in the knowledge that the latter was married (paragraph 464).

PART VII.—ALIMENT

Aliment and legal rights

(50) Where a wife shows to the satisfaction of the court that she has been deserted or that she has been compelled to leave the matrimonial home by conduct of a grave and weighty nature on the part of her husband which is such that she could not in the face of it reasonably be expected to continue with the conjugal life, she should be entitled to apply to the Sheriff Court or to the Court of Session for aliment; the husband should also be given the right to apply for aliment in the same circumstances if he is unable to maintain himself (paragraph 551).

(51) (Seventeen members in favour, two against.) Legal rights on divorce should be abolished and, instead, it should be left to the court in each case to adjust the nature and extent of the provision, if any, to be made for the innocent spouse; the court should have power to make such provision either by way of a capital sum or by annual payment or partly by the one and partly by the other as might seem best to the court in the circumstances of the particular case, and on a change of circumstances to vary or terminate the provision so made; provided that, if a spouse marries again after divorce, then, subject to any agreement between the parties to the contrary, he or she should cease to have any claim against the other spouse for financial provision (paragraphs 546 and 553).

Note. Two members prefer to keep legal rights on divorce, subject to certain modifications, and to give the innocent spouse the right to choose between claiming legal rights and applying to the court for financial provision to be made for him or her.

(52) (Eighteen members in favour, one against.) After a decree of divorce the court should have power, on the application of either party, to vary the terms of any settlement made in contemplation of or during the marriage (paragraph 554).

(53) Where a decree of divorce has been granted on the ground of the defender's incurable insanity, the court, in addition to its present powers, should have power to order provision to be made for the pursuer and for the children, if any (paragraph 555).

(54) Where a decree of divorce has been granted and the defender has since died, the pursuer should have the right to apply for provision to be made for him or her out of the deceased's net estate and the court should have power to make such order as it thinks fit (paragraph 556).

(55) On or after a decree of nullity, the court should have power to make a provision for either of the parties by way of a capital sum or periodical payments or both (paragraph 557).

(56) A wife (or a husband as the case may be) should be able to apply to the Court of Session or Sheriff Court, on or at any time within one year after the making of an order for provision by way of a capital sum or periodical payments, for an order setting aside any disposition of his property made by her husband, or former husband, within a period of three years before the making of the order for financial provision; the court should have power to make such an order if the disposition is shown to have been made for the purpose of defeating the wife's claims, provided that the rights of a *bona fide* purchaser for value will not be defeated (paragraphs 534 and 559).

Maintenance for children

(57) The principle that husband and wife are jointly liable for the maintenance of the children should be followed in any matrimonial proceedings in which the question of the maintenance of children arises (paragraph 568).

(58) In matrimonial proceedings the court should have power to order one or other spouse, or both spouses, to make separate provision for the support of the following additional classes of children:

- (i) illegitimate children of the two spouses;
- (ii) children of either spouse (including a child adopted by either spouse), if living in family at the time when the home broke up;
- (iii) illegitimate children of either spouse, if living in family at the time the home broke up;
- (iv) other children (excluding boarded-out children) who were living in family with the spouses and maintained by one or both of them at the time when the home broke up.

(Paragraph 575.)

PART IX.—PROPERTY RIGHTS

The matrimonial home and its contents

(59) (Eighteen members in favour, one against.) If one spouse has left the other spouse in the matrimonial home

- (a) he or she should not be able to turn out the other spouse or take away any of the essential contents of the home without an order of the Court of Session or Sheriff Court; and
- (b) the other spouse should be able to apply to the Court of Session or Sheriff Court for an order restraining (for such period as the court thinks fit or until further order) that spouse from disposing of any interest in the home or in the essential contents, or surrendering the tenancy; the order, when in restraint of the spouse disposing of any interest in the home or surrendering the tenancy, should be capable of registration as a charge on the land; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation (paragraphs 667–675, 681–682 and 684–685).

(60) (Eighteen members in favour, one against.) If one spouse has left the other spouse in the matrimonial home and has then failed to pay instalments under a mortgage, or under a hire purchase agreement in respect of any of the essential contents of the home, the person to whom such instalments are due should be bound to accept payment if tendered by that other spouse; either spouse should then be able to apply to the court at any time for an

order as to the disposition of the house or the contents and the court should have power to make such order as it considers reasonable in the interests of both parties in the particular circumstances (paragraphs 676-684 and 686).

(61) (Eighteen members in favour, one against.) On the application of a husband or a wife who has obtained a decree of divorce, nullity or separation, the court should have power to make one or more of the following orders :

- (i) An order allowing the applicant to reside until further order in the matrimonial home if this is owned by the other spouse (or is jointly owned by the spouses) ; the order should be capable of registration as a charge on the land ; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation.
- (ii) An order substituting the applicant as tenant if the tenancy of the matrimonial home is in the name of the other spouse and is a dwellinghouse to which the Rent Restriction Acts apply (or as sole tenant if there is a joint tenancy). The landlord should have a right to be heard on the application, to appeal, and to apply at any time for cancellation of the order.
- (iii) An order providing for an equitable division between the husband and the wife of the entire contents of the matrimonial home (including any articles being bought on hire purchase) ; in making such an order on a decree of divorce or nullity of marriage, the court should be able to transfer ownership (or the rights under a hire purchase agreement) in any articles from one spouse to the other but on a decree of separation the court should be able to award the use only, and until further order, to the one spouse of any articles owned by the other.

The recommendation in (60) should be extended to apply to a spouse who has obtained an order allowing him or her to occupy the matrimonial home (paragraphs 687-697).

(62) (Eighteen members in favour, one against.) On the institution of proceedings for divorce, nullity or separation, the court should have power, on the application of a party seeking a decree in his or her favour, to grant an interdict until further order against the other party restraining her or him from disposing of any interest in the home or its contents ; the order, when in restraint of the spouse disposing of any interest in the home or surrendering the tenancy, should be capable of registration as a charge on the land ; when the order has been registered, third parties who may subsequently acquire an interest in the property should take that interest subject to the spouse's right of occupation (paragraph 698).

Savings from housekeeping money

(63) Savings made from money contributed by either the husband or the wife or by both for the purpose of meeting housekeeping expenses (and any investments or purchases made from such savings) should be deemed to belong to husband and wife in equal shares unless they have otherwise agreed (paragraph 701).

Benefits under the National Insurance Scheme

(64) Provision should be made to allow a wife who has divorced her husband to use the contributions which he made under the National Insurance Scheme, during the marriage, to help her to qualify for a retirement pension on reaching pensionable age (paragraph 713).

(65) When the children are living with their mother, it should be made possible for her to draw an allowance for them, under the National Insurance Scheme, if her former husband dies and in consequence she is deprived of the money which he has been contributing for the children's support (paragraph 714).

PART XI.—THE COURT WHICH SHOULD HAVE JURISDICTION OVER MATRIMONIAL CAUSES

(66) The Court of Session should continue to exercise an exclusive jurisdiction in divorce (paragraph 771).

PART XII.—THE BASIS OF MATRIMONIAL JURISDICTION AND THE RECOGNITION OF THE JURISDICTION OF OTHER COUNTRIES

Note. The principal recommendations of the Commission are summarised in Appendix IV.

PART XIII.—THE ADMINISTRATION OF THE LAW

Aliment

(67) Where a wife (or a husband as the case may be) wishes to raise an action against her husband in the Sheriff Court for separation and aliment, or adherence and aliment, or any other action in which she seeks a conclusion for the payment of aliment, and the amount of aliment claimed does not exceed the sum of £5 per week for the wife and £1 10s. for each child (if any), the proceedings (including proceedings for the variation or termination of the order) should be conducted and disposed of by a simplified procedure on the same lines as that applicable to Small Debt actions, but subject to the qualification that (a) there must be a proof, and (b) an appeal on questions of law should be allowed by way of a stated case to the Court of Session (paragraphs 973–974 and 976).

(68) In addition to its present jurisdiction, the Sheriff Court should have jurisdiction to entertain an action for separation and aliment, or adherence and aliment, or any other action in which one spouse is concluding for aliment against the other spouse, if the pursuer resides within the sheriffdom; the Sheriff Court should have power *ex proprio motu*, or on cause shown, to transfer any such action to any other Sheriff Court if it appears that that court is a more appropriate venue, and the court to which the action is thus transferred should then have jurisdiction to deal with it (paragraph 979).

(69) It would be desirable that payments under an order for aliment (made in proceedings between husband and wife in the Sheriff Court) should be made to an officer of the court and that the court should assist the wife to enforce her order if the payments fall into arrear, in particular by providing for the service of process by an officer of the court; this proposal should, however, be considered in the course of a general review of the law of diligence (paragraph 984).

(70) Provision should be made, on the same lines as the Maintenance Orders (Facilities for Enforcement) Act, 1920, and the Maintenance Orders Act, 1950, to facilitate the enforcement in other Commonwealth countries of orders for aliment made by the Scottish courts and the enforcement in Scotland of orders for maintenance made by the courts of those countries (paragraph 988).

Evidence

(71) Proof of a finding of adultery against a party to matrimonial proceedings in a court of competent jurisdiction in the United Kingdom should

be received as *prima facie* evidence of his or her adultery in subsequent matrimonial proceedings (paragraphs 931 and 989).

(72) Proof of a conviction by a court of competent jurisdiction in the United Kingdom for bigamy or for rape or other sexual offences should be received as *prima facie* evidence in matrimonial proceedings of the commission of the act or acts of which the offender has been found guilty (paragraphs 931 and 989).

Note. One member considers that proof of a conviction for these offences should be conclusive evidence.

(73) Proof that a person has entered into a bigamous marriage, whether by production of a certificate of conviction for bigamy or by any other means, should raise a rebuttable presumption in matrimonial proceedings that that person has committed adultery (paragraphs 932 and 989).

The Lord Advocate

(74) Where the Lord Advocate considers it desirable that a decision given in a consistorial action and involving a point of law of exceptional public interest should be reviewed by a higher court, then, provided that none of the parties intends to appeal from that decision or that the time for appeal has elapsed, the Lord Advocate should be able to bring before the appropriate appellate court a consultative case based on the circumstances of the actual case in the court below; the decision in the consultative case should not be binding on the parties to the actual case, but in all other respects should carry the authority of the tribunal which gave it (paragraphs 968 and 991).

PART XV.—THE LAW PROHIBITING MARRIAGE WITH CERTAIN RELATIONS BY KINDRED OR AFFINITY

(75) (Sixteen members in favour, three against.) It should be permissible for a man or woman whose former marriage has been dissolved to marry during the lifetime of his or her former spouse any person whom he or she could lawfully marry at the present time if that former spouse were dead (paragraph 1169).

PART XVI.—MISCELLANEOUS MATTERS

(76) (Twelve members in favour, seven against.) The principle that a child should be legitimated by the subsequent marriage of its parents in all circumstances should not be introduced into the law (paragraph 1182).

Note. (i) Seven members consider that all children born out of wedlock should be legitimated by the subsequent marriage of their parents. (ii) The Commission's conclusions on this subject are subject to the reservation that the evidence on which they are based may not have been complete (see paragraph 1171).

(77) On the assumption that it should be decided not to introduce the principle that all children should be legitimated by the subsequent marriage of their parents, a child should be legitimated on the subsequent marriage of his parents if they were free to marry at the time of the child's birth (paragraph 1183).

(78) Any bequest to or appointment in favour of one spouse contained in the will of the other spouse should be invalidated if the marriage is subsequently dissolved or annulled, unless the will contains express provision to the contrary (paragraphs 1189–1191).

(79) Where a spouse has obtained from the court a decree presuming the death of the other spouse and dissolving the marriage, the fact that the spouse presumed to be dead is alive, or was alive at the material time,

should not be a ground of itself for applying to the court for the decree to be reduced once the decree has become final and the time for appeal has lapsed (paragraph 1198).

(80) The Acts of 1592, c. 11, and 1600, c. 20, should be repealed (paragraph 1202).

(81) The Sheriff Court should have power to grant a spouse an order for protection on the ground of the conviction of the other spouse for a sexual offence against a child of either or both spouses, or a child living in family with them; the order should operate in the same way as a decree of separation, except that it should be open to either spouse to apply to the court on cause shown to revoke the order at any time after twelve months from its making (paragraph 1203).

1205. We have been most fortunate in our Secretariat. The first Secretary was Mr. K. H. S. Edwards, who did very valuable work in the early stages, but was recalled to his parent department in 1952. His successor, Miss M. Dennehy, C.B.E., has been a tower of strength throughout the remainder of our long and difficult task. Her work never fell below the highest standards of efficiency, and she showed great forethought and imagination in all that she did. Her skill in drafting and grasp of principle and detail have been invaluable. The Assistant Secretaries, Mr. A. T. F. Ogilvie and Mr. D. R. L. Holloway, have also earned our gratitude by admirable work. Mr. Ogilvie devoted particular attention to the Scottish aspect of all matters within our terms of reference. Mr. Holloway's intimate knowledge of English divorce law and procedure has been of the utmost value throughout, and he undertook the duties of Secretary to the Private International Law Committee and carried them out with conspicuous ability.

ALL OF WHICH WE HUMBLY SUBMIT FOR YOUR MAJESTY'S
GRACIOUS CONSIDERATION

MORTON OF HENRYTON (*Chairman*).
ROSEMARY PORTAL.
KEITH OF AVONHOLM.
E. HOLROYD PEARCE.
JAMES WALKER.
W. RUSSELL BRAIN.
F. J. BURROWS.
ALICE G. J. BRAGG.
H. L. O. FLECKER.
THOMAS YOUNG.
K. W. JONES-ROBERTS.
H. H. MADDOCKS.
MARGARET W. ALLEN.*
MAY D. BAIRD.
ROBERT BELOE.
ETHEL M. BRACE.
GEORGE C. P. BROWN.
GEOFFREY LAWRENCE.
DARRELL MACE.

M. DENNEHY (*Secretary*).

D. R. HOLLOWAY (*Assistant Secretary*).

A. T. F. OGILVIE (*Assistant Secretary*).

20th December, 1955.

* We wish to record our deep regret on learning that Mrs. Margaret Allen died very shortly after she had signed the Report.

STATEMENT OF HIS VIEWS BY LORD WALKER

1. I regret that I am unable simply to concur in the conclusion that the doctrine of the matrimonial offence ought to be retained as the basis of the divorce law (see paragraph 65).

2. To some extent that doctrine has already been departed from by the introduction of divorce for incurable insanity ; and also, perhaps, by permitting dissolution of marriage in circumstances where one of the parties may be presumed dead—that is when, contrary to the presumption, the party is not actually dead. In those two cases it may be said that, as at the date of divorce or dissolution, there was no reasonable prospect of married life being resumed. Mrs. Eirene White, M.P., now seeks acceptance of the principle that the *de facto* breakdown of a marriage to an extent that rules out reasonable hope of reconciliation should in itself be considered a ground for legal dissolution at the suit of either party.

3. I agree with those who think that to permit divorce by consent would be to destroy the concept of marriage as a life-long union.

4. Although in her evidence Mrs. White conceded that her principle would in effect permit divorce by consent after seven years' separation I do not agree that that is so. A marriage cannot fairly be said to have broken down beyond hope of reconciliation merely because the parties had consented to lead separate lives in the past and intended to do so in future ; for consent may be withdrawn and intention may change. What does preclude hope of reconciliation is rather the character of the acts done by the parties respectively and of the events affecting their lives. A broken marriage may, I think, be defined as one where the facts and circumstances affecting the lives of the parties adversely to one another are such as to make it improbable that an ordinary husband and wife would ever resume cohabitation. I do not believe that the danger of parties ending their marriage by consent would be greater than under the existing law. In many cases no doubt both parties are desirous of divorce, but under either system it would equally be necessary to establish some important objective fact not created by consent.

5. The doctrine of the matrimonial offence is appropriate as defining the circumstances in which husband or wife is entitled to the lesser remedies of judicial separation and restitution of conjugal rights or adherence and aliment. Probably no one would commit a matrimonial offence merely for the purpose of having a decree of judicial separation or of restitution of conjugal rights pronounced against himself ; nor would anyone raise such proceedings except under a sense of injury by reason of the offence. The position is different, however, where the matrimonial offence is considered as a ground for divorce. It is not, I think, doubtful that people do commit adultery or desert solely in the expectation that divorce will follow ; nor is it doubtful that divorce proceedings do follow not from a sense of injury but in a spirit of thankfulness that a way out of the marriage has opened. Where two people desire their freedom the doctrine of the matrimonial offence tells them only too plainly what one need do in order that the other should obtain a divorce. Since cruelty became a ground for divorce as well as for judicial separation the conception of what amounts to cruelty has, I think, expanded. As the standards of good conduct and of good health are raised it becomes easier to satisfy the requirements of conduct seriously adverse to married life and of probable injury to health. Where divorce is granted today on the ground of cruelty in one of its more attenuated forms I doubt whether in

all cases the parties would have ceased to live together had the only remedy for cruelty continued to be judicial separation. In divorce the matrimonial offence thus tends to become a technical cause of action without a real cause for complaint, and leads to marriage being dissolved where, if the law were otherwise, cohabitation would probably continue. The stability of any marriage depends on a balancing of reluctance to commit a matrimonial offence and to take divorce proceedings as against the attraction of freedom from that marriage and liberty to enter into another. Within the last forty years public opinion has become more tolerant of the commission of matrimonial offences and of divorce. If, as is not improbable, this trend continues the doctrine of the matrimonial offence as the basis for divorce may well prove seriously harmful to marriage as an institution. The demand for the setting up of reconciliation machinery at the present day points to the conclusion that no marriage ought to be dissolved so long as hope of reconciliation remains. I think the law could best assist in attaining that end if the doctrine of the matrimonial offence as the basis for divorce were abandoned and replaced by the principle of dissolution on breakdown as the sole mode of ending the marriage tie.

6. The doctrine of the matrimonial offence allows divorce only at the option of the party innocent of the offence against the party guilty of the offence, whereas the principle of dissolution on breakdown of marriage would allow dissolution at the option of either party. Whether the option is with one party as at present, or is given to both parties, it is possible to figure hard cases that might arise, but these (divorce by consent apart) are inherent in any attempted solution of the problem of dissolving an indissoluble union. The commission of a matrimonial offence is often the symptom or sequel of a marriage which had broken down for quite other reasons; and in such cases the party morally responsible for the breakdown is sometimes, under the existing law, permitted to masquerade as the legally innocent party. I do not, however, think the problem can usefully be considered from the point of view of hardship to individuals. Divorce, differing from judicial separation, is a matter in which the public interest ought to be regarded as paramount. In relation to divorce the Memorandum submitted on behalf of the Church of England, in its first paragraph, lays emphasis on the importance of proceeding from some general principle as to the significance of marriage in itself and as a social institution. I accept that as being the proper principle to follow. The true significance of marriage as I see it is life-long cohabitation in the home for the family. But when the prospect of continuing cohabitation has ceased the true view as to the significance of marriage seems to require that the legal tie should be dissolved. Each empty tie—as empty ties accumulate—adds increasing harm to the community and injury to the ideal of marriage. The simplest and I think the best solution is that the law—which will not enforce cohabitation—should favour the dissolution of broken marriages at the suit of either party.

7. My view accordingly is that the doctrine of the matrimonial offence ought to be abandoned as the basis for divorce and replaced by a provision that marriage should be indissoluble unless, having lived apart for not less than three years, either party shews that the marriage has broken down in the sense I have endeavoured to define in paragraph 4 above. However, should that view not be adopted the need for some principle—even though, as I think, it is not the best principle—requires that the doctrine of the matrimonial offence should be adhered to as closely as may be, and without the new grounds of divorce proposed by some of the members in paragraphs 70 and 71.

JAMES WALKER.

20th December, 1955.

NOTE OF DISSENT BY SIR FREDERICK BURROWS

1. It is with extreme regret that I find myself unable to agree with my colleagues on the following recommendations of the Commission.

Paragraph 529. Realisation of estate of missing husband to support wife and children

2. In my opinion, to give the High Court power to direct the receiver to the estate of a missing husband to realise a portion of the capital in order to provide sufficient income for his wife and children would lead often to injustice.

3. The court might make an order to realise the modest estate of a man who had left the country for very good reasons of his own; on his return he might find himself penniless and, in addition, his liberty might also be in jeopardy, as presumably his wife would be able to apply for him to be committed to prison if, after his return, the maintenance payments were to fall in arrear. Had he not travelled abroad the income only could have been used for maintenance.

Paragraph 530. Appointment of receiver for estates of missing persons in general

4. Although the Commission agrees that this matter is outside its terms of reference, nevertheless the majority makes the suggestion that consideration might be given to investing the High Court with some general powers to appoint a receiver to administer the estate of a missing person, irrespective of whether the person concerned has left a spouse and children. Since this touches upon a matter of the widest importance and interest far exceeding the scope of the present enquiry, I feel that I must dissassociate myself from any comment upon the point.

Paragraph 685. Restraint on disposal of property upon desertion

5. The adoption of the recommendation that a departing spouse may be restrained by a court order from disposing of any interest in the home or its essential contents would bring injustice in many instances. It would help the spiteful wife or sullen husband to remain in possession of the home after driving out the other spouse by intolerable behaviour. Desertion in such circumstances is not infrequent, and is usually justified, but it is often difficult to convince a court of this.

6. I am conscious that the recommendation is designed to take care of the hard cases which will undoubtedly occur in its absence, but I believe that the provision will create more injustice than it will cure.

7. The registration of a charge upon land in favour of the remaining spouse places an unfair burden upon a landlord, and one in which he is allowed no voice. It will unquestionably depreciate his property if for any reason he wishes to dispose of it. I am therefore unable to agree that the remaining spouse should have security of tenure in the event of sale to a third party.

Paragraph 697. Transfer of tenancy and division of property on divorce or judicial separation

8. I consider that for a court to tie up the husband's house by allowing the wife to live in it is an unwarrantable interference with property rights and is particularly objectionable as the registered charge binds the subsequent interests in the property.

9. The fault does not always lie entirely on the side of the “guilty” party and it might well occur that the “innocent” party, by intolerable behaviour, contributes towards the break-up of the marriage and is yet able legally to obtain command of the property of the other spouse.

10. I feel that it is an equally unwarrantable interference for a court to provide the tenant for another person’s property without the owner’s full consent. There may be perfectly good reasons why a landlord may object to a wife as tenant in place of her husband—or *vice versa*—and it should be left to him to accept or reject the transfer as he thinks fit.

11. In respect of an order awarding the use only of household articles after a judicial separation, no provision could be made to protect the property of one spouse from being wantonly destroyed by the other who has the temporary use.

Paragraph 698. Injunction against disposal of property pending proceedings for divorce or judicial separation

12. It is only necessary to say that this provision would enable a spiteful wife or a vindictive husband to hold the sword of Damocles over the head of the other for a considerable period, pending the hearing of the proceedings.

Paragraph 1049. Liability under a maintenance order during cohabitation

13. The Commission agrees (paragraph 1044) that it would be undesirable in principle for a court to fix a housekeeping allowance. The making of an order for maintenance on the basis that husband and wife would continue to cohabit would have, to all intents and purposes, the same effect and would be open to the same objections.

14. The marital relationship is likely in many cases to be seriously strained if a wife who felt that she was not receiving a sufficient allowance from her husband could hold over him the threat that she would apply for a maintenance order. Capitulation in face of such a threat—and not necessarily a justified one—is likely to increase rather than decrease marital strife.

15. The possibility that a husband could be committed to prison at his wife’s instigation, whilst they were living together as husband and wife, is very real. A spiteful wife might well knowingly contribute to bringing this about, and it would result in a gross miscarriage of justice.

16. Although it seems that there is nothing in the statute to prevent a wife who has obtained an order from the High Court under Section 23 of the Matrimonial Causes Act, 1950, from enforcing the order whilst she is still living in the same house as her husband, I strongly deprecate the extension to magistrates’ courts of the power to make such orders.

Paragraph 1169. The law prohibiting marriage with certain relations by kindred or affinity

17. Though our terms of reference invited us specifically to consider this matter, we were enjoined also to have in mind the need to promote and maintain healthy and happy married life, and to safeguard the interest and well-being of children. I feel strongly that the adoption of the majority recommendation would tend to imperil the happiness of many marriages.

18. I think it is worth recalling that the two recent attempts to pass amending legislation through the House of Lords, namely, the personal case presented in the “Stevenson Marriage Bill” and Lord Mancroft’s “Marriage (Enabling) Bill”, were both withdrawn.

19. I cannot but think that even if these Bills had been passed in the House of Lords, despite the opposition of the Episcopal Bench and others, they would have come under heavy fire in the Lower House.

20. The volume of evidence in support of the suggested alteration in the law, in addition to that of Lord Mancroft, was considerable, but it was not, in my opinion, sufficient to counterbalance the very weighty opposition to the proposal.

21. The Lord Archbishop of Canterbury, speaking on behalf of the Church of England, said in evidence :

“Accordingly it must be the desire of all responsible people that by the deliberate will of its citizens and by the operation of the nation’s laws, the national standards and habits should approximate as far as possible to the Christian standard. Thus, whether explicitly on Christian grounds or simply on grounds of national well-being, the principle should be to adhere as far as possible to the Christian standard and to allow departures from it only regretfully and owing to ‘the hardness of men’s hearts’ and with as little detriment as possible to the stability of the family as the indispensable unit of a sound national life.”

And in Appendix B to his Memorandum, he writes :

“Death is one thing: it is not likely one partner would actively desire the death of the other partner ; still less that he or she would seek to cause death. If death comes, it is *ab extra* and it brings a release from the formerly existing situation. The partner thus released may legitimately and without any threat to the family stability and in accordance with the Church’s canon law seek to marry the deceased partner’s brother or sister.

The ending of a marriage by divorce is an altogether different matter. It is not a natural event like death, but an unnatural and artificially caused event. It can be planned for and brought about. The possibility of marrying a divorced partner’s brother or sister casts a terrible shadow backwards. The ‘triangle’ of emotions is taken into the circle of the family. Affections in danger of being attached to the brother-in-law or sister-in-law are no longer suppressed as improper and incapable of fulfilment. A divorce is always a possibility and the affections, being capable of fulfilment, may cease to be regarded as altogether improper and may be allowed to develop instead of being suppressed.”

22. The General Assembly of the Church of Scotland and the representatives of the Free Churches were also against the proposal, and the attitude in opposition of the Roman Catholic Church is without question.

23. I believe that the overwhelming mass of public opinion in this country agrees with the views of the Lord Archbishop of Canterbury, which I have quoted above, and I feel sure that any departure from the present law would undermine family life and put in great jeopardy many now happy marriages.

F. J. BURROWS.

20th December, 1955.

APPENDIX I

LISTS OF WITNESSES AND CORRESPONDENTS

*(The names and descriptions of witnesses and correspondents are given as at
the date when their evidence was given or written material submitted)*

A. List of witnesses who gave oral evidence (see also List B)

The oral evidence given by these witnesses, together with any written material, has been published in the Minutes of Evidence and the Appendix thereto.

Department, organisation or individual witness	Witnesses representing Departments or organisations	Minutes of Evidence— Day/Appendix
*After-Care Council (Scotland)...	Mr. W. Hewitson Brown, O.B.E. ...	41
Maitre F. E. J. Allemès ...	—	17
Association of Assistant Mistresses	Miss N. W. Wooldridge ...	13
Association of Children's Officers	Mr. E. Ainscow; Miss K. L. Ruddock; Mr. K. Brill, Hon. Secretary.	14
Association of County Court Registrars.	Mr. J. H. Lawton, President ...	31
Association of Head Mistresses...	Miss M. J. Bishop, M.A.; Miss A. Catnach, C.B.E., B.A.	13
Baptist Union of Great Britain and Ireland.	Rev. E. C. Urwin, M.A., B.D. ...	3, Appendix
Bar of England and Wales, General Council of the	Mr. H. A. H. Christie, Q.C., Vice- Chairman; Mr. R. J. A. Temple, Q.C.; Mr. J. B. Lately, M.B.E.	2, 17
Sir Thomas Barnes, G.C.B., C.B.E., Queen's Proctor.	—	36
Mr. T. K. P. Barrett, Director of the John Hilton Bureau.	—	17
*Dr. I. R. C. Batchelor, M.B., M.R.C.P.E., D.P.M.	—	38
Miss M. G. Billson, M.A., LL.B., Solicitor.	—	10
British Medical Association—see Dr. H. Guy Dain.	—	6
Catholic Union of Great Britain	Rev. Dr. J. J. Crowley, Ph.D.; Mr. R. O'Sullivan, Q.C.; Mrs. Kembell, J.P.; Rev. R. C. Gorman, S.J., Chairman of the Catholic Marriage Advisory Council.	16
Catholic Union of Great Britain, Scottish Committee of	Mr. D. W. R. Brand, Advocate, Secretary to the Committee.	23
*Central After-Care Association	Rev. Martin W. Pinker; Miss H. L. Long.	41
Lady Chatterjee, O.B.E., M.A., D.Sc., Barrister-at-Law.	—	14
Mr. A. J. Chislett, Clerk to the Justices, Wallington.	—	35
Church in Wales ...	The Right Rev. the Lord Bishop of Monmouth.	10
Church of England ...	His Grace the Lord Archbishop of Canterbury; the Right Rev. the Lord Bishop of London; Rev. Canon Hugh Warner, Secretary of the Church of England Moral Welfare Council; Dr. G. L. Russell.	6

* Gave evidence in private.

Department, organisation or individual witness	Witnesses representing Departments or organisations	Minutes of Evidence— Day/Appendix
Church of Scotland	Very Rev. J. Hutchison Cockburn, D.D., Convener of the Special <i>Ad Hoc</i> Committee; Sheriff J. R. Philip, Q.C., Procurator to the General Assembly; Rev. Professor W. S. Tindal, O.B.E., D.D.; Mrs. G. S. Duncan.	22
City of Glasgow Society of Social Service.	Mr. John Kelso, B.L., Hon. Law Agent of the Society's Western Free Legal Dispensary; Mr. William Muir, Assistant Secretary.	21
Mrs. Eric Coombs	—	9
The Right Hon. Lord Cooper, O.B.E., LL.D., Lord President of the Court of Session.	—	20
Mr. G. H. Crispin, Barrister-at- Law.	—	19
Mrs. M. A. Cumella, M.B.E., J.P., Barrister-at-Law.	—	18
Dr. H. Guy Dain, F.R.C.S., LL.D.	—	6
Mr. T. F. Davis, Metropolitan Magistrate.	—	37
Divorce Law Reform Union ...	The Right Hon. Lord Meston, member of the Council of the Union; Mrs. E. M. Watson, Hon. Secretary.	7
His Honour W. G. Earengay, Q.C., B.A., LL.D., and Mrs. Florence Earengay, B.A., J.P., Barrister- at-Law.	—	4
Ethical Union	Mr. H. J. Blackham, B.A., General Secretary; Mrs. Virginia Flemming, member of the Council; Mr. A. F. Dawn, B.A., M.Sc., member of the Council.	29
Fabian Society, Group set up by	Mr. and Mrs. Ellis Birk, joint secre- taries of the Group.	18
Faculty of Advocates	Mr. C. J. D. Shaw, Q.C.; Miss M. H. Kidd, Q.C.; Mr. A. M. Johnston, Advocate.	25
Faculty of Procurators of Greenock and Faculty of Procurators in Paisley.	Mr. Ian Brown, B.L., Solicitor ...	20
Family Welfare Association ...	Mr. B. E. Astbury, C.B.E., General Secretary.	31, Appendix
Federation of British Detectives	Mr. Sidney Bullock, President; Mr. Jack Ballard, Hon. Secretary.	30
*The Hon. Mr. Justice Finlay, Judge of the Supreme Court, New Zealand.	—	40
Free Church Federal Council ...	Rev. E. C. Urwin, M.A., B.D. ...	3, Appendix
Dr. D. H. Geffen, M.D., D.P.H.	—	33
Dr. Annis Gillie, M.R.C.P. ...	—	6
Professor L. C. B. Gower, M.B.E., LL.M., Professor of Commercial Law, University of London.	—	1
Mr. J. M. Gregory-Jones, Solicitor	—	18
Mr. E. R. Guest, Metropolitan Magistrate.	—	36
Haldane Society	Mr. W. Harvey Moore, Q.C., Chair- man; Mr. Stuart Shields, Hon. Secretary.	17

* Gave evidence in private.

Department, organisation or individual witness	Witnesses representing Departments or organisations	Minutes of Evidence— Day/Appendix
Headmasters' Conference ...	Mr. Robert Birley, C.M.G., M.A., D.C.L., F.S.A., Headmaster of Eton College; Mr. G. C. Turner, C.M.G., M.C., M.A., Headmaster of Charter- house; Mr. H. W. House, D.S.O., M.C., M.A., Master of Wellington College.	13
*Professor Sir David Henderson, M.B., Ch.B., M.D., F.R.F.P. & S. (Glas.), F.R.C.P.E., F.R.C.P.	—	38
Mr. W. J. C. Heyting, LL.B., Solicitor.	—	10
Dr. J. A. Hobson, M.D., M.R.C.P., D.P.M.	—	6
The Right Hon. Sir Francis Lord Charlton Hodson, M.C., Lord Justice of Appeal.	—	30
*Home Office (and Prison Com- mission).	Mr. P. Allen, C.B.	41
Justices' Clerks' Society	Mr. John P. Wilson, President; Mr. Albert Marshall, member of the Council of the Society; Mr. B. J. Hartwell, LL.M., Hon. Secretary.	12, Appendix
Law Society	Mr. D. L. Bateson, President; Sir Sydney Littlewood; Mr. E. A. Doughty; Mr. E. C. Harvey; Mr. A. J. Driver; Miss E. E. Spicer.	29
Law Society of Scotland, Council of the	Dr. J. S. Muirhead, D.S.O., M.C., T.D., D. L., M.A. (Oxon.), LL.B., LL.D., President of the Society; Mr. Hamilton Lyons, B.L.; Mr. G. B. L. Motherwell, W.S.	24, Appendix
*Mr. W. E. Leicester, a member of the New Zealand Bar.	—	39
Mr. C. C. C. Lewis, Solicitor ...	—	35
London Magistrates' Clerks' Association.	Mr. D. Sutton; Mr. D. E Hughes, LL.B.; Mr. S. French, M.A.	33, Appendix
Professor D. R. Mace, M.A., B.Sc., Ph.D., Professor of Human Relations, Drew University, Madison, U.S.A. (formerly General Secretary of the National Marriage Guidance Council).	—	19
Mr. A. T. Macmillan, Barrister- at-Law.	—	5
Magistrates' Association	Mr. G. G. Raphael, J.P., Chairman of Committee of the Association; Sir Leonard Costello, C.B.E., M.A., LL.B., J.P., Chairman of the Devon Quarter Sessions; Mrs. I. M. H. MacAdam, M.B., J.P.	11, Appendix
The Right Hon. Lord Mancroft, M.B.E., T.D., M.A.	—	1
Marriage Law Reform Society ...	Mr. R. S. W. Pollard, J.P., Chairman; Mr. L. E. Crosland, Chairman of the Manchester and District Branch; Mr. Stephen Keleny, LL.D., Treasurer; Lt.-Col. Marcus Lipton, J.P., M.P., a sponsor of the Society; Miss R. M. Howard, member of the Committee.	9

* Gave evidence in private.

Department, organisation or individual witness	Witnesses representing Departments or organisations	Minutes of Evidence— Day/Appendix
Married Women's Association ...	Mrs. Elizabeth Pomeroy, Chairman; Mr. A. Nabarro, LL.B., member of the Legal Committee.	37
Mr. Hamish Masson, W.S. ...	—	24
The Right Hon. Lord Merriman, G.C.V.O., O.B.E., LL.D., Presi- dent of the Probate, Divorce and Admiralty Division.	—	15
Methodist Church of Great Britain	Rev. E. C. Urwin, M.A., B.D., General Secretary of the Department of Christian Citizenship.	3, Appendix
Modern Churchmen's Union ...	Very Rev. Dr. W. R. Matthews, Dean of St. Pauls; Very Rev. J. H. Cruse, Provost of Sheffield; Rev. Harry Bailey, Chairman of the Council of the Union; Rev. P. Gardner-Smith, Dean of Jesus College, Cambridge; Mr. Leslie Brooks, Barrister-at-Law.	19
*Professor Alan Moncrieff, C.B.E., M.D., F.R.C.P.	—	38
Mothers' Union	Mrs. Fisher, President; Mrs. Remson- Ward, Central Secretary; Mrs. Shackleton; Mrs. Llewellyn-Davies.	4, Appendix
Muir Society	Mr. S. Shaw, Q.C., Chairman; Mr. G. Stott, Q.C.; Mr. J. Farquharson, S.S.C.	27
Mr. Claud Mullins	—	13
National Association for Mental Health.	Dr. H. V. Dicks, member of the Council of the Association; Dr. Colman Kenton, Medical Director of the Association.	7
National Association of Probation Officers.	Mr. H. W. Bird; Miss J. E. R. Kennedy; Mr. Frank Dawtry, General Secretary.	11, Appendix
National Association of Probation Officers, Scottish Branch of	Miss J. S. Pearson; Mr. T. F. Henshil- wood; Mr. D. R. Keir.	26
National Baby Welfare Council...	Miss Gladys Sandes, F.R.C.S., Chair- man of the Executive Committee.	33
National Council of Social Service	Miss K. M. Oswald, Head of the Citizens' Advice Bureaux Depart- ment; Miss F. E. Peck, M.B.E., Secretary of the Liverpool Personal Service Society.	31, Appendix
National Council of Women ...	Mrs. M. Lefroy, M.A., J.P., President; Mrs. M. F. Bligh, B.Sc., Secretary of the Moral Welfare Committee; Mrs. C. Jolliffe, B.Sc., Parliamentary Secretary.	33
National Council of Women, Scottish Standing Committee of the	Miss A. F. M. MacFarlane; Mrs. C. R. MacNee, Vice-Chairman; Lady Ramsay Steel-Maitland, member of the Committee; Miss E. M. Houston, M.A., LL.B., Hon. Legal Adviser; Miss B. Martin-Stewart, Hon. Treasurer.	28
National Federation of Business and Professional Women's Clubs of Great Britain and Northern Ireland.	Lady Littlewood, J.P., legal adviser and member of the Executive Com- mittee; Miss Marion Crowdy, J.P., member of National Executive.	34
National Federation of Business and Professional Women's Clubs, Scottish Division of	Miss M. B. Smith; Miss A. Stuart- Cooper, President.	22

* Gave evidence in private.

Department, organisation or individual witness	Witnesses representing Departments or organisations	Minutes of Evidence— Day/Appendix
National Marriage Guidance Council.	Mr. A. J. Brayshaw, B.A., General Secretary; Mrs. Marjorie C. Hume, member of the Council; Mr. A. H. B. Ingleby, O.B.E., B.Sc., Education Secretary.	5, Appendix
National Married Men's Associa- tion.	Mr. William B. Colvin, member of the Committee.	28
National Society for the Preven- tion of Cruelty to Children.	Mr. G. E. Foster, member of the Central Executive.	3
National Union of Teachers ...	Mr. O. Barnett, B.E.M., B.A., Vice- President; Mr. E. L. Britton, M.A., Chairman of the Education Com- mittee; Miss A. M. Edwards, Vice- Chairman of the Education Com- mittee; Mr. W. Griffith, Secretary of the Education Committee.	14
Mrs. Helena Normanton, Q.C. ...	—	34
Dr. Doris Odum, M.A., D.P.M.	—	6
Mr. Frank J. Powell, Metropolitan Magistrate.	—	32
Progressive League	Mr. A. Craig	36
Mr. H. O. Roberts, Solicitor ...	—	10
Royal Medico-Psychological Association.	Dr. A. Walk, M.D., D.P.M., member of the Council of the Association; Dr. J. A. Hobson, M.D., M.R.C.P., D.P.M.	37
Royal Medico-Psychological Association, Scottish Division of	Dr. A. M. Shenkin, M.B., Ch.B., D.P.M.	37
Royal Scottish Society for the Pre- vention of Cruelty to Children.	Mr. C. A. Cumming Forsyth, General Secretary.	26
The Viscount St. Davids	—	35
Scottish Association for Mental Health.	Dr. Mary Knight; Miss C. G. Haldane, J.P.; Mr. J. Adair, O.B.E.; Mr. J. Anderson, M.A.; Mr. J. Robb, M.B.E., Secretary.	27
Scottish Children's Officers' Asso- ciation.	Mr. R. Brough; Mr. T. Johnstone, B.Sc., D.P.A., Vice-President.	23
* Scottish Home Department ...	Mr. N. J. P. Hutchison	41
Scottish Marriage Guidance Council.	Mr. John Watson, W.S., Dr. McKay Hart, M.B., Ch.B., F.R.F.P.S.(G.), F.R.C.O.G., Mrs. N. A. Oatts, members of the Council.	21
Mr. J. E. S. Simon, Q.C., M.P....	—	8
Six Point Group	Mrs. Juanita Frances, member of the Executive Committee; Miss Roxane Arnold, Vice-Chairman; Mrs. L. Horton, member of the Executive Committee.	32
Dr. Eliot Slater, M.A., M.D., F.R.C.P.	—	16
† Professor T. B. Smith, M.A., Professor of Scots Law, Univer- sity of Aberdeen.	—	26
Society of Solicitors in the Supreme Courts of Scotland.	Mr. W. MacDuff Urquhart, S.S.C., Vice-President; Mr. Neil Watson, S.S.C.	25
Society of Stipendiary Magistrates of England and Wales.	Mr. Waldo Briggs, Chairman; Mr. F. Bancroft Turner, Hon. Secretary.	36

* Gave evidence in private.

† A memorandum was submitted jointly by Professor and Mrs. T. B. Smith.

Department, organisation or individual witness	Witnesses representing Departments or organisations	Minutes of Evidence—Day/Appendix
Society of Writers to Her Majesty's Signet, Council of the	Sir Ernest M. Wedderburn, Deputy Keeper of the Signet; Mr. D. G. McGregor, W.S.; Mr. J. L. Falconer, W.S.	25
Soldiers', Sailors' and Airmen's Families Association.	Mr. M. H. Nisbet, Secretary; Lt.-Col. R. H. Russell, Hon. Consulting Solicitor and member of the Council; Lt.-Col. J. F. Batten, O.B.E., M.C., Director of Overseas Service; Mrs. M. E. N. Higham, Hon. Secretary of the Oxford City Division.	31
Soldiers', Sailors' and Airmen's Families Association, Scottish Branch of	Miss I. C. Buchan, Secretary of Glasgow Branch; Col. A. Sprot, D.S.O., Secretary of Scottish Branch.	22
Dr. Marie C. Stopes, D.Sc., Ph.D., F.L.S., F.G.S., F.R.S.Lit.	—	32
Dr. A. Walk, D.P.M.	—	6
Mrs. Eirene White, M.P.... ..	—	1
Mrs. Holt Wilson, J.P.	—	37
Women Citizens' Association, National	Mrs. Vera Webb, President; Mrs. Billington-Greig; Mrs. J. V. S. Petrie, R.R.C., Chairman of the Executive Committee.	34
Women Citizens' Associations, Scottish Council of	Mrs. J. B. Thomson, President of the Council; Miss I. H. McLelland, Vice-President of the Glasgow Association; Miss A. Harrison, President of the Edinburgh Association.	27
Women's Co-operative Guild ...	Mrs. Winifred Barnes; Mrs. Cicely Cook, O.B.E., General Secretary.	5, Appendix
Mrs. Moya Woodside	—	16

B. List of witnesses who gave oral evidence to the Committee on Private International Law

The oral evidence given by these witnesses has not been published but written material, if any, is included in the printed Minutes of Evidence and the Appendix thereto.

Department, organisation or individual witness	Witnesses representing Departments or organisations	Minutes of Evidence—Day/Appendix
Bar of England and Wales, General Council of the Colonial Office	Mr. R. J. A. Temple, Q.C.; Mr. J. B. Latey, M.B.E. Sir Kenneth Roberts-Wray, K.C.M.G.; Mr. J. E. Hopkinson.	2 Appendix
Mr. D. W. Dobson, O.B.E.	—	—
Professor R. H. Graveson	—	Appendix
International Law Association ...	Mr. William Latey, M.B.E., Q.C., Chairman of the Family Relations Committee.	Appendix
National Council of Women ...	Mrs. Florence Earengay, B.A., J.P. ...	33
Mr. Walter Raeburn, Q.C.	—	Appendix
Mr. J. E. S. Simon, Q.C., M.P....	—	8
Six Point Group	Miss Roxane Arnold	32

C. List of some other organisations and individuals who submitted written material

The Commission also received over two thousand letters, statements and other written material from other organisations and individuals. Those who assisted the Commission in this way included the following:

The Alliance
Association of Social Workers
Baptist Union of Scotland
*Boards of the Nationalised Industries
British Commonwealth League
*British Employers' Confederation
British Federation of Psychologists (Human Relationships Department)
British Federation of University Women, Ltd.
British Social Biology Council
The Chief Rabbi
Children's Moral Welfare Workers' Association
Common Wealth
Congregational Union of Scotland
*Co-operative Union, Ltd. (Parliamentary Committee)
Council of Married Women
Croydon and District Standing Conference of Women's Organisations
Episcopal Church in Scotland
Family Planning Association
Free Church of Scotland
Free Presbyterian Church of Scotland
General Assembly of Unitarian and Free Christian Churches (special Sub-Committee)
Gospel Standard Strict Baptist Societies
Hayward's Heath Social Service Centre and Citizens' Advice Bureau
Howard League for Penal Reform
The Imam, Shah Jehan Mosque, Woking
Independent Labour Party
Lawyers' Christian Fellowship
London Housewives' Association for the Protection of Family Life
National Secular Society
National Union of Conservative and Unionist Associations (Women's National Advisory Committee)
National Union of Women Teachers
News Chronicle Research Unit
*Presbyterian Church of England
Rationalist Press Association Ltd.
Religious Society of Friends
Royal College of Midwives
Salvation Army
Save the Children Fund
Sex Education Society
Socialist Medical Association (Social Workers' Group)
Society for Sex Education and Guidance
Society of Labour Lawyers
Standing Joint Committee of Working Women's Organisations
Status of Women Committee
St. Joan's Social and Political Alliance
*Trades Union Congress
True Law Party
West Riding of Yorkshire Federation of Councils of Free Church Women
Young Women's Christian Association of Great Britain
Mr. A. W. Acworth
Mr. Ambrose Appelbe, M.A., LL.B.
Miss Anne Ashley, M.B.E., M.A.
Mr. J. A. Barnes, M.A.

* Statement printed in the Appendix to the Minutes of Evidence.

Mr. M. C. Batten
 *Sir Eric Beckett, K.C.M.G., Q.C.
 Mr. Peter Benenson
 Mr. W. M. Bennett
 Mr. Ernest I. Biffen
 Mr. E. H. Bungay
 *Dr. G. C. Cheshire, D.C.L., F.B.A.
 Dr. Eustace Chesser, L.R.C.P., L.R.C.S., L.R.F.P.S.
 Mr. Francis Clare-Pearson
 Mr. John J. Clarke, M.A., F.S.S., L.M.T.P.I.
 Mr. R. de Mornay Davies
 Mr. J. P. Eddy, Q.C.
 Mr. T. G. Elphinston
 Mr. T. J. Faithfull, M.R.C.V.S.
 *Mr. Gerald Gardiner, Q.C.
 Miss M. M. Gibbon
 Rev. C. A. Heal
 Dr. H. W. Heasman
 Mr. G. M. Hebblethwaite
 Mrs. Eveline Hill, J.P., M.P.
 Sir Westrow Hulse, Bart.
 Mr. E. L. Jones, M.B.E.
 Mr. John Lees, LL.B.
 Dr. Mary Macaulay, M.B., Ch.B., J.P.
 Dr. R. N. C. McCurdy, M.B., Ch.B., D.P.H.
 The Right Hon. Lord MacDermott, M.C., LL.D.
 Mr. J. E. Clare McFarlane
 The Hon. Lord Mackintosh, M.C., LL.D.
 The Hon. Mr. C. E. Martin, M.Ec., LL.B., M.L.A. (Attorney-General for New South Wales)
 Mr. Harry Mottershead
 Mr. H. S. Murphy
 Sheriff C. de B. Murray
 Mr. Henry D. Myer
 Dr. Bernard Myers, M.D., F.R.C.P.
 Mr. Charles W. Odell
 Mrs. Reith Oram
 Mr. Geoffrey Pardoe
 Mr. Dale H. Parkinson, LL.B.
 Mr. O. H. Parsons
 Mr. A. Laurence Polak, B.A.
 Dr. J. B. Wrathall Rowe
 The Right Hon. Lord Saltoun, M.C.
 Dr. Susanne Shafar, M.B., Ch.B., D.P.M.
 Rev. Bernard Sharp
 Rev. J. P. Stevenson, T.D., S.C.F.
 Mrs. D. E. Stewart-Matthews
 Mr. H. F. R. Styrke (with the concurrence of Mr. Leslie Marks)
 Miss Mary E. Sykes, B.A., LL.B.
 The Hon. Mr. Justice Vaisey
 Mr. Hugh Vaudrey, LL.B.
 Mrs. Mary Walsh
 Mrs. M. S. Watkins, J.P.
 †Mr. H. W. Wightwick, M.C.
 Mr. Registrar Wilkinson
 His Honour Judge Willes
 *The Hon. Mr. Justice Willmer, O.B.E.
 Mr. G. W. Wilton, Q.C.
 Dr. J. F. W. B. Worsley, D.C.L.

* Statement printed in the Appendix to the Minutes of Evidence.

† Memorandum printed in the Minutes of Evidence, 29th Day.

D. List of Government Departments

The Commission has also been greatly helped by written material supplied by the following Government Departments:

- Board of Control (England and Wales)
- Board of Inland Revenue
- *Colonial Office
- Commonwealth Relations Office
- Department of Health for Scotland
- Foreign Office
- General Board of Control for Scotland
- General Register Office
- †Home Office
- Lord Advocate's Department
- Lord Chancellor's Office
- Ministry of Health
- Ministry of Housing and Local Government
- Ministry of Labour and National Service
- Ministry of Pensions and National Insurance
- National Assistance Board
- Principal Probate Registry
- Registrar-General's Office, Scotland
- †Scottish Home Department
- Treasury Solicitor's Office

* Also gave oral evidence—see List B.

† Also gave oral evidence—see List A.

APPENDIX II

STATISTICS

The Commission desires to express its indebtedness to the General Register Office, England and Wales, to the County Courts Branch, Lord Chancellor's Department, and to the Registrar-General's Office, Scotland, for their valuable help in compiling these and other statistics for the use of the Commission.

<i>Index</i>	<i>Table</i>
Matrimonial petitions filed, England and Wales:	
Divorce, nullity, judicial separation and restitution of conjugal rights	1
Matrimonial decrees granted, according to grounds, England and Wales:	
Divorce—decrees <i>nisi</i>	2 (i)
Nullity—decrees <i>nisi</i>	2 (ii)
Judicial separation	2 (iii)
Restitution of conjugal rights	2 (iv)
Consistorial actions, Court of Session, Scotland:	
Actions in which final judgment given	3
Grounds of divorce actions	
Decrees granted	
Duration of marriage	
Actions in which there were children of the marriage	
Actions relating to marriage in the Sheriff Courts, Scotland	4
Number of divorces and crude divorce rates in England, Scotland and certain other countries, 1910 to 1953	5
Married population, divorce petitions filed and rate per 10,000 married population, in 1911, 1921, 1937 and 1950; and the percentage increase of each in the intermediate periods; England and Wales	6
Approximate proportion of marriages terminated by divorce, 1911 to 1954, England and Wales	7
Married population, divorce actions and rate per 10,000 married population, 1911, 1921, 1937 and 1950; and the percentage increase of each in the intermediate periods; Scotland	8
Approximate proportion of marriages terminated by divorce, 1911 to 1954, Scotland	9
Divorce rates per 1,000 married women, by wife's present age and duration of marriage, 1953, England and Wales	10
Divorce rates per 1,000 married women, by nominal age at marriage of wife and duration of marriage, 1953, England and Wales	11
Divorce rates per 1,000 married women, by wife's present age and duration of marriage, 1953, Scotland	12
Divorce rates per 1,000 married women, by nominal age at marriage of wife and duration of marriage, 1953, Scotland	13
<i>Diagram</i>	
Petitions for divorce and decrees <i>nisi</i> made absolute, 1909 to 1926 and 1936 to 1953, England and Wales	A
Divorce decrees granted, 1909 to 1926 and 1936 to 1953, Scotland	B

TABLE 1. MATRIMONIAL PETITIONS FILED, ENGLAND AND WALES

Year	Divorce			Nullity of marriage			Judicial separation			Restitution of conjugal rights		
	By husband	By wife	Total	By husband	By wife	Total	By husband	By wife	Total	By husband	By wife	Total
1858			244			10			82			11
59			211			2			80			9
1860			210			2			62			13
61			187			5			49			11
62			200			4			48			13
63			255			7			43			9
64			231			15			66			17
65			222			5			62			11
66			215			8			64			17
67			224			9			70			15
68			236			3			67			14
69			265			7			86			13
1870			264			8			87			14
71			298			5			86			19
72			303			9			71			11
73			336			12			80			18
74			379			11			88			16
75			362			14			89			15
76			400			9			136			26
77			423			12			128			21
78			516			14			116			18
79			441			14			114			20
1880			470			2			145			21
81			470			17			119			11
82			368			22			113			24
83			439			10			122			21
84			522			17			125			30
85			431			13			110			13
86			575			15			133			22
87			529			10			133			21
88			541			15			139			23
89			528			21			126			25

TABLE 1. MATRIMONIAL PETITIONS FILED, ENGLAND AND WALES—(continued)

Year	Divorce			Nullity of marriage			Judicial separation			Restitution of conjugal rights		
	By husband	By wife	Total	By husband	By wife	Total	By husband	By wife	Total	By husband	By wife	Total
1890	318	216	534	3	7	10	10	100	110	1	13	14
'91	313	224	537	7	16	23	5	90	95	2	11	13
'92	306	220	526	11	3	14	4	97	101	1	15	16
'93	309	224	533	8	8	11	3	109	112	5	17	22
'94	314	233	547	13	16	29	9	96	105	2	21	23
'95	353	220	573	14	18	32	4	106	110	2	17	19
'96	393	280	673	15	12	27	3	96	99	2	16	20
'97	414	269	683	10	10	20	2	96	98	—	20	20
'98	401	243	644	12	12	24	4	102	106	2	20	22
'99	383	262	645	8	14	22	4	78	82	5	16	21
1900	360	249	609	13	13	26	3	86	89	5	18	23
01	491	259	750	8	12	20	3	95	98	4	26	30
02	596	293	889	10	20	30	2	96	98	1	32	33
03	488	337	825	9	7	16	4	86	90	2	29	31
04	448	272	720	13	17	30	5	87	92	3	32	35
05	429	323	752	16	14	30	5	74	76	3	40	43
06	442	325	767	17	12	29	2	82	85	6	48	54
07	419	315	734	12	24	36	3	66	67	—	62	65
08	472	374	846	12	20	32	1	89	93	3	68	72
09	451	336	787	16	15	31	1	57	58	4	67	69
10	412	343	755	12	14	26	1	76	81	2	86	90
11	466	393	859	20	23	43	5	72	77	3	122	125
12	506	414	920	12	24	36	—	91	91	5	130	135
13	548	450	998	17	22	39	1	85	86	2	156	158
14	607	468	1,075	16	13	29	3	65	68	2	134	136
15	682	461	1,143	18	7	25	1	72	73	2	138	140
16	781	382	1,163	15	20	35	—	87	87	4	155	159
17	1,044	379	1,423	19	17	36	4	86	90	6	230	236
18	1,807	516	2,323	20	19	39	—	85	85	2	491	493
19	4,076	1,009	5,085	54	45	99	3	117	120	8	489	497
20	3,211	1,270	4,481	47	37	84	1	131	132	4	418	422
21	1,637	1,153	2,790	60	57	117	—	—	—	—	—	—

1922	1,312	1,076	2,388	46	34	80	—	133	133	7	396	43
23	1,316	1,446	2,762	28	43	71	5	132	137	3	239	242
24	1,115	1,798	2,913	30	35	65	5	112	117	3	49	52
25	1,210	1,763	2,973	39	42	81	5	110	115	6	35	41
26	1,487	2,061	3,548	34	39	83	2	107	109	9	33	42
27	1,709	2,486	4,195	47	52	99	1	104	105	5	40	45
28	1,645	2,309	3,954	47	47	96	4	124	128	3	37	40
29	1,631	2,258	3,889	48	60	108	3	101	104	2	31	33
1930	1,814	2,345	4,159	62	67	129	5	136	141	6	41	47
31	1,955	2,354	4,309	61	69	130	3	121	124	3	37	40
32	1,890	2,462	4,352	56	56	116	4	129	133	5	32	37
33	2,129	2,552	4,681	56	58	114	3	121	124	4	46	50
34	2,181	2,546	4,727	84	87	171	5	94	99	4	45	49
35	2,367	2,790	5,157	77	87	164	3	111	114	4	36	43
36	2,617	2,958	5,575	91	83	174	—	119	119	4	43	47
37	2,765	2,985	5,750	75	78	153	3	110	113	3	30	33
38	4,649	5,321	9,970	167	96	263	10	61	71	5	41	46
39	3,822	4,695	8,517	96	90	186	8	59	67	3	54	57
1940	3,485	3,430	6,915	100	71	171	3	50	53	4	38	42
41	4,279	3,800	8,079	127	99	226	13	39	52	6	25	31
42	6,303	5,310	11,613	247	143	390	10	69	79	—	43	49
43	8,100	6,787	14,887	288	210	498	18	67	85	2	51	53
44	10,154	8,236	18,390	328	251	579	8	58	66	4	47	51
45	14,271	10,586	24,857	503	351	854	14	64	78	8	57	57
46	26,429	15,275	41,704	911	548	1,459	12	95	107	13	109	122
47	28,749	18,292	47,041	944	516	1,460	12	137	149	13	109	122
48	18,456	18,619	37,075	408	339	844	8	121	129	19	90	109
49	16,766	17,677	34,443	505	340	748	15	119	134	18	90	108
1950	13,207	15,889	29,096	361	272	633	5	78	83	19	37	56
51	16,265	21,372	37,637	414	331	745	25	82	107	27	35	62
52	14,705	19,065	33,770	464	333	797	23	96	119	27	40	67
53	13,159	16,686	29,845	381	316	697	12	91	103	23	33	56
54	12,708	15,639	28,347	364	325	689	14	90	104	21	23	44

TABLE 2. MATRIMONIAL DECREES GRANTED, ENGLAND AND WALES

(i) Divorce—decrees *nisi*

Year	Total number	Adultery	Adultery with another matrimonial offence	Rape, sodomy, bestiality
1867*	119			
1868	137			
1869	193			
1870	220			
1871	191			
1872	107			
1873	272			
1874	284			
1875	194			
1876	332			
1877	301			
1878	496			
1879	267		Figures not available	
1880	356			
1881	299			
1882	307			
1883	383			
1884	340			
1885	343			
1886	419			
1887	435			
1888	360			
1889	284			
1890	394			
1891	335			
1892	392			
1893	393			
1894	357			
1895	478			
1896	486	298	188	—
1897	583	328	255	—
1898	431	258	172	1
1899	525	308	217	—
1900	494	302	191	1
1901	601	372	229	—
1902	608	388	218	2
1903	614	395	219	—
1904	634	345	288	1
1905	623	359	261	3
1906	650	361	289	—
1907	598	329	269	—
1908	672	362	310	—
1909	685	378	307	—
1910	588	304	284	—
1911	655	370	285	—
1912	690	390	300	—
1913	870	457	413	—
1914	693	362	331	—
1915	1,060	602	458	—
1916	686	398	288	—
1917	946	639	306	1
1918	1,407	989	417	1
1919	2,610	2,010	599	1

* The figures for 1858 to 1866 are not available.

TABLE 2. MATRIMONIAL DECREES GRANTED, ENGLAND AND WALES—(continued)

(i) Divorce—decrees nisi—(continued)

Year	Total number	Adultery	Adultery with another matrimonial offence		Rape, sodomy, bestiality		
1920 ...	2,985	2,247	737		1		
1921 ...	3,956	2,706	1,249		1		
1922 ...	2,455	1,430	1,023		2		
1923 ...	2,591	1,448	1,141		2		
1924 ...	2,454	1,970	482†		2		
1925 ...	2,657	2,442	214		1		
1926 ...	2,859	2,703	156		—		
1927 ...	3,740	3,631	108		1		
1928 ...	3,758	3,694	58		6		
1929 ...	3,392	3,367	24		1		
1930 ...	3,802	3,785	15		2		
1931 ...	3,958	3,947	11		—		
1932 ...	3,925	3,913	10		2		
1933 ...	3,988	3,981	7		—		
1934 ...	4,200	4,195	4		1		
1935 ...	4,547	4,542	3		2		
1936 ...	4,868	4,864	2		2		
1937 ...	5,044	5,042	2		—		
		Adultery	Desertion	Cruelty	Insanity	Pre- sumption of death	Rape, sodomy, bestiality
1938 ...	7,621	5,349	1,874	306	79	13	—
1939 ...	8,248	4,439	2,905	596	260	45	3
1940 ...	7,111	4,006	2,440	476	164	24	1
1941 ...	6,318	3,562	2,286	323	137	10	—
1942 ...	8,608	5,164	2,870	384	175	12	3
1943 ...	10,724	6,615	3,418	482	188	17	4
1944 ...	14,356	9,118	4,385	617	214	17	5
1945 ...	18,982	12,509	5,415	819	221	18	—
1946 ...	31,871	22,252	8,172	1,153	277	15	2
1947 ...	52,249	37,297	12,710	1,881	292	58	11
1948 ...	40,764	24,635	13,281	2,385	384	72	7
1949 ...	33,967	15,608	15,535	2,406	347	62	9
1950 ...	29,482	12,413	14,219	2,523	270	52	5
1951 ...	29,936	12,008	14,616	2,986	273	46	7
1952 ...	31,966	13,221	15,038	3,297	326	66	18
1953 ...	29,275	12,341	12,981	3,622	241	71	19
1954 ...	27,353	11,794	11,640	3,593	239	74	13

† The Matrimonial Causes Act, 1923, allowed wives to obtain a divorce on the ground of adultery without more.

TABLE 2. MATRIMONIAL DECREES GRANTED, ENGLAND AND WALES—(continued)

(ii) Nullity—decrees *nisi*

Year	Total number	Impotency	Invalidity*	Insanity†	Pregnancy‡	Wilful‡ refusal	Venereal‡ disease
1869 ...	5						
1870 ...	9						
1871 ...	5						
1872 ...	2						
1873 ...	4						
1874 ...	7						
1875 ...	4						
1876 ...	3						
1877 ...	6						
1878 ...	10						
1879 ...	3						
1880 ...	6						
1881 ...	3						
1882 ...	9						
1883 ...	11	Figures not available					
1884 ...	7						
1885 ...	8						
1886 ...	11						
1887 ...	8						
1888 ...	6						
1889 ...	7						
1890 ...	10						
1891 ...	5						
1892 ...	14						
1893 ...	10						
1894 ...	15						
1895 ...	18						
1896 ...	22	19	3	—			
1897 ...	13	8	5	—			
1898 ...	11	4	7	—			
1899 ...	20	12	8	—			
1900 ...	23	18	5	—			
1901 ...	18	12	6	—			
1902 ...	21	14	7	—			
1903 ...	9	3	6	—			
1904 ...	23	13	10	—			
1905 ...	21	21	—	—			
1906 ...	24	17	7	—			
1907 ...	23	15	8	—			
1908 ...	32	28	3	1			
1909 ...	22	20	2	—			
1910 ...	19	15	3	1			
1911 ...	25	22	3	—			
1912 ...	31	21	10	—			
1913 ...	23	18	5	—			
1914 ...	19	15	4	—			
1915 ...	16	12	4	—			
1916 ...	17	13	4	—			
1917 ...	32	26	6	—			
1918 ...	30	15	15	—			
1919 ...	30	18	11	1			
1920 ...	49	33	16	—			
1921 ...	82	68	14	—			
1922 ...	84	67	17	—			
1923 ...	59	47	12	—			
1924 ...	46	38	8	—			
1925 ...	58	48	10	—			
1926 ...	64	52	12	—			

TABLE 2. MATRIMONIAL DECREES GRANTED, ENGLAND AND WALES—(continued)

(ii) Nullity—decrees *nisi*—(continued)

Year	Total number	Impotency	Invalidity*	Insanity†	Pregnancy‡	Wilful‡ refusal	Venereal‡ disease
1927 ...	72	63	9	—			
1928 ...	77	71	6	—			
1929 ...	83	77	6	—			
1930 ...	85	76	9	—			
1931 ...	105	93	12	—			
1932 ...	87	75	12	—			
1933 ...	106	94	12	—			
1934 ...	116	103	13	—			
1935 ...	132	123	9	—			
1936 ...	141	130	11	—			
1937 ...	151	142	9	—			
1938 ...	170	116	20	3	3	27	1
1939 ...	178	93	9	2	6	65	3
1940 ...	139	65	8	3	4	59	—
1941 ...	143	69	4	—	6	64	—
1942 ...	230	82	7	1	11	127	2
1943 ...	330	131	14	—	18	164	3
1944 ...	406	178	10	1	25	189	3
1945 ...	500	197	17	5	26	253	2
1946 ...	861	226	30	2	56	537	10
1947 ...	1,543	503	57	11	46	920	6
1948 ...	894	329	57	9	22	474	3
1949 ...	654	259	46	7	20	320	2
1950 ...	584	223	45	8	14	291	3
1951 ...	559	222	42	7	13	272	3
1952 ...	655	272	61	8	6	306	2
1953 ...	596	230	63	10	20	271	2
1954 ...	577	250	50	8	11	257	1

* Includes bigamy, lack of consent, prohibited degrees of relationship, nonage and informality.

† After 1937, the figures include decrees granted on the statutory ground; these form the majority, if not the whole, of the decrees granted on the ground of insanity.

‡ These grounds were not available before 1st January, 1938.

(iii) Judicial separation

Year	Total number	Adultery	Desertion	Cruelty
1867 ...	11			
1868 ...	23			
1869 ...	25			
1870 ...	22			
1871 ...	22			
1872 ...	22			
1873 ...	23			
1874 ...	36			
1875 ...	19			
1876 ...	27			
1877 ...	47			
1878 ...	57			
1879 ...	38			

Figures not available

TABLE 2. MATRIMONIAL DECREES GRANTED, ENGLAND AND WALES—(continued)

(iii) Judicial separation—(continued)

Year	Total number	Adultery	Desertion	Cruelty
1880	58			
1881	53			
1882	29			
1883	45			
1884	45			
1885	33			
1886	47			
1887	56			
1888	54		Figures not available	
1889	28			
1890	51			
1891	29			
1892	19			
1893	30			
1894	18			
1895	27			
1896	44	16	1	27
1897	26	10	2	14
1898	27	12	2	13
1899	34	12	3	19
1900	19	9	1	9
1901	27	14	1	12
1902	29	10	8	11
1903	18	8	3	7
1904	22	12	5	5
1905	25	10	2	13
1906	20	10	2	8
1907	31	14	4	13
1908	28	9	3	16
1909	25	11	3	11
1910	22	12	1	9
1911	12	8	2	2
1912	32	15	6	11
1913	22	11	5	6
1914	22	11	3	8
1915	37	16	5	16
1916	22	8	7	7
1917	30	11	6	13
1918	37	17	9	11
1919	30	3	13	14
1920	40	14	14	12
1921	46	18	13	15
1922	46	17	12	17
1923	50	15	15	20
1924	34	6	12	16
1925	36	12	6	18
1926	29	11	6	12
1927	39	12	7	20
1928	38	10	7	21
1929	31	7	10	14
1930	25	7	5	13
1931	28	4	7	17
1932	29	9	3	17
1933	34	8	8	18
1934	23	8	6	9
1935	27	10	8	9
1936	22	8	6	8
1937	32	13	11	8
1938	25	10	3	12
1939	22	12	3	7

TABLE 2. MATRIMONIAL DECREES GRANTED, ENGLAND AND WALES—(continued)

(iii) Judicial separation—(continued)

Year	Total number	Adultery	Desertion	Cruelty
1940	23	10	2	11
1941	21	12	5	4
1942	31	23	4	4
1943	33	25	3	5
1944	31	21	2	8
1945	42	33	7	2
1946	39	28	7	4
1947	91	63	7	21
1948	83	55	16	12
1949	89	55	16	18
1950	51	28	7	16
1951	51	34	6	11
1952	77	45	12	20
1953	60	36	8	16
1954	74	36	12	26

(iv) Restitution of conjugal rights

Year	Total number	Year	Total number	Year	Total number
1868 ...	2	1897 ...	7	1926 ...	13
1869 ...	3	1898 ...	15	1927 ...	20
		1899 ...	6	1928 ...	18
1870 ...	5			1929 ...	12
1871 ...	6	1900 ...	9		
1872 ...	2	1901 ...	12	1930 ...	12
1873 ...	1	1902 ...	23	1931 ...	21
1874 ...	4	1903 ...	19	1932 ...	9
1875 ...	7	1904 ...	18	1933 ...	11
1876 ...	2	1905 ...	20	1934 ...	22
1877 ...	3	1906 ...	25	1935 ...	10
1878 ...	—	1907 ...	30	1936 ...	18
1879 ...	1	1908 ...	58	1937 ...	11
		1909 ...	40	1938 ...	27
1880 ...	2			1939 ...	28
1881 ...	3	1910 ...	61		
1882 ...	2	1911 ...	52	1940 ...	20
1883 ...	5	1912 ...	83	1941 ...	18
1884 ...	1	1913 ...	126	1942 ...	16
1885 ...	5	1914 ...	114	1943 ...	20
1886 ...	6	1915 ...	133	1944 ...	26
1887 ...	6	1916 ...	81	1945 ...	39
1888 ...	6	1917 ...	130	1946 ...	35
1889 ...	5	1918 ...	180	1947 ...	65
		1919 ...	310	1948 ...	70
1890 ...	4			1949 ...	46
1891 ...	5	1920 ...	385		
1892 ...	5	1921 ...	463	1950 ...	34
1893 ...	10	1922 ...	334	1951 ...	35
1894 ...	10	1923 ...	309	1952 ...	27
1895 ...	8	1924 ...	34*	1953 ...	33
1896 ...	2	1925 ...	24	1954 ...	27

* Before the Matrimonial Causes Act, 1923, a wife could obtain a divorce on the ground of her husband's adultery only when coupled with some other matrimonial offence, of which non-compliance with a decree of restitution of conjugal rights was one.

TABLE 3. CONSISTORIAL ACTIONS IN THE COURT OF SESSION, SCOTLAND

	1898	1899	1900	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910	1911	1912	1913	1914	1915	1916
<i>Divorce</i>																			
Actions in which final judgment given	153	175	151	171	223	201	193	182	174	203	201	193	226	236	253	251	362	244	266
On grounds of:																			
Adultery	72	100	84	115	144	120	110	108	108	105	115	112	121	114	128	114	181	120	118
Desertion	81	75	67	56	79	81	83	74	66	98	86	81	105	122	125	137	181	124	148
At instance of:																			
Husbands	73	70	69	72	110	98	77	79	81	100	87	82	87	109	104	105	162	98	127
Wives	80	105	82	99	113	103	116	103	93	103	114	111	139	127	149	146	200	138	141
Divorce granted	145	165	142	161	216	192	187	170	169	197	191	188	222	233	246	247	351	238	265
<i>Separation</i>																			
Actions in which final judgment given	24	47	44	39	39	34	31	23	28	21	15	6	—	10	7	6	2	6	11
Separation granted	21	39	38	33	33	28	25	18	23	21	14	4	—	6	6	6	2	3	7
<i>Duration of marriage where divorce or separation granted*</i>																			
Under 1 year	—	1	2	2	1	1	2	3	—	—	2	1	2	1	—	—	1	3	—
1-2 years	12	3	16	6	25	22	14	14	10	23	13	21	21	16	17	23	20	15	17
2-5 years	69	69	70	11	81	66	69	71	81	53	76	65	87	85	74	83	112	87	88
5-10 years	71	92	72	87	108	96	93	83	83	72	89	86	95	117	131	118	189	102	133
10-20 years	24	40	33	40	43	49	45	32	27	26	35	25	19	24	35	29	41	42	32
0 years and over																			
<i>Actions in which there were</i>																			
Children of marriage	111	143	134	132	180	156	148	129	134	138	138	120	128	167	175	167	238	179	179
No children	66	79	61	78	82	79	76	76	68	86	78	79	98	79	85	90	126	71	98

* In the period 1898 to 1924 these figures relate to actions in which final judgment was given.

TABLE 3. CONSISTORIAL ACTIONS IN THE COURT OF SESSION, SCOTLAND—(continued)

	1917	1918	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935
Divorce																			
Actions in which final judgment given	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
On grounds of:																			
Adultery	177	296	587	509	372	325	219	238	241	235	244	280	309	264	343	296	297	312	528
Desertion	121	191	224	216	148	171	150	211	224	204	249	239	232	227	247	206	231	215	341
At instance of:																			187
Husbands	158	296	555	416	277	255	188	200	212	197	238	215	250	214	262	228	265	275	293
Wives	140	191	256	309	243	241	181	249	253	250	255	304	291	277	328	274	263	252	235
Divorce granted	296	480	796	706	498	482	362	437	448	420	466	498	516	462	558	476	501	504	520
Separation																			
Actions in which final judgment given	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Separation granted	5	6	8	15	11	15	9	4	7	8	9	6	4	10	10	12	6	3	4
Duration of marriage where divorce or separation granted																			
Under	1	1	3	3	1	2	—	—	—	—	1	—	1	1	—	2	—	2	—
1 year	2	7	9	18	10	13	54	60	49	33	47	52	4	2	2	8	7	2	1
1-5 years	29	74	123	106	85	86	126	176	195	206	214	231	55	44	49	62	39	42	41
5-10 years	97	165	288	223	138	149	144	155	152	130	145	170	232	170	207	189	169	193	176
10-20 years	142	176	305	289	217	184	53	60	54	56	51	50	53	46	255	178	228	205	237
20 years and over	32	70	91	101	80	77	—	—	—	—	—	—	—	—	51	42	59	61	68
Actions in which there were																			
Children of marriage	211	322	539	478	326	341	216	283	294	277	296	335	350	323	411	324	346	322	360
No children	92	171	280	262	205	170	162	170	178	170	206	190	195	178	189	190	188	208	172

• In the period 1898 to 1924 these figures relate to actions in which final judgment was given.

TABLE 3. CONSISTORIAL ACTIONS IN THE COURT OF SESSION, SCOTLAND—(continued)

	1936	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954
<i>Divorce</i>																			
Actions in which final judgment given	631	643	822	884	805	772	1,027	1,317	1,745	2,237	2,911	2,527	2,049	2,442	2,216	1,957	2,756	2,420	2,271
On grounds of:																			
Adultery	386	386	453	439	380	370	490	732	1,067	1,517	2,006	1,576	1,123	1,025	851	728	1,059	970	861
Desertion	245	257	369	392	370	349	467	509	583	619	798	824	785	1,282	1,242	1,086	1,460	1,265	1,153
Insanity†	—	—	—	21	22	13	17	28	18	28	20	24	19	20	13	22	23	21	14
Cruelty	—	—	—	32	33	40	53	48	77	73	87	103	122	115	108	121	208	212	241
Sodomy†	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	2	2
At instance of:																			
Husbands	318	328	402	426	421	402	552	775	1,088	1,546	1,971	1,531	1,110	1,352	1,140	920	1,256	1,057	996
Wives	313	315	420	458	384	370	475	542	657	691	940	966	939	1,098	1,076	1,037	1,500	1,363	1,275
Divorce granted	618	637	812	869	794	760	1,011	1,301	1,711	2,205	2,878	2,499	2,020	2,418	2,185	1,927	2,701	2,353	2,200
<i>Separation</i>																			
Actions in which final judgment given	8	4	2	4	4	2	2	5	4	3	2	2	2	4	7	2	9	8	9
Separation granted	6	2	2	3	3	1	2	5	2	2	2	2	2	4	4	1	5	4	6
<i>Duration of marriage where divorce or separation granted</i>																			
Under 1 year	1	1	—	2	2	—	2	2	1	3	2	2	1	—	—	1	2	—	1
1-2 years	8	8	4	11	8	89	102	163	15	13	24	35	14	15	12	11	9	17	12
2-5 years	47	51	89	112	74	246	301	463	271	337	469	397	268	314	265	198	250	216	225
5-10 years	202	220	279	284	276	387	367	503	503	525	1,446	983	796	1,044	924	734	939	769	750
10-20 years	289	339	341	341	314	291	387	498	654	741	920	798	666	783	723	701	1,055	914	835
20 years and over	82	82	103	122	123	126	196	266	269	298	319	288	277	266	265	283	451	441	383
<i>Actions in which there were</i>																			
Children of marriage	414	392	523	542	514	498	673	877	1,142	1,383	1,742	1,491	1,206	1,420	1,325	1,222	1,830	1,674	1,546
No children	225	255	301	346	295	276	356	445	607	857	1,171	1,038	845	1,026	898	737	935	754	734

† Additional grounds for divorce under the Divorce (Scotland) Act, 1938.

TABLE 4. ACTIONS RELATING TO MARRIAGE IN THE SHERIFF COURTS, SCOTLAND

Year	Total number	Year	Total number	Year	Total number
1898	64	1917	153	1936	279
99	15	18	192	37	241
1900	30	19	235	38	274
01	28	1920	356	39	235
02	32	21	328	1940	218
03	32	22	253	41	194
04	25	23	231	42	217
05	31	24	287	43	270
06	28	25	266	44	330
07	47	26	249	45	262
08	279	27	254	46	291
09	225	28	303	47	306
1910	217	29	275	48	252
11	229	1930	306	49	249
12	246	31	286	1950	235
13	229	32	276	51	328
14	219	33	278	52	452
15	159	34	284	53	560
16	147	35	292	54	583

NOTES:

(1) The statistics relate to actions ended by final judgment.

(2) The breakdown into the different kinds of actions is not available but for the most part the actions are actions of separation and aliment and of adherence and aliment.

TABLE 5. NUMBER OF DIVORCES AND CRUDE DIVORCE RATES, ENGLAND, SCOTLAND AND CERTAIN OTHER COUNTRIES, 1910 TO 1953

(The crude divorce rate is the number of divorces per 1,000 total population. These figures should be treated with caution. If (for example, in the case of Southern Rhodesia) there is a high rate of adult immigration, the crude divorce rate is apt to be unreliable as an index of divorce in the country. In comparing crude divorce rates in the various countries, the influence of different proportions of married persons in the population and different racial, religious, social and economic factors should be kept in mind.)

Year	England		Scotland		France		Belgium		Netherlands		Switzerland		Norway		Denmark		Sweden		United States		Canada		Union of South Africa		Southern Rhodesia		New Zealand		Australia	
	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate	No. of divorces	Rate
1910	579	0·02	222	0·05	14,261	0·36	1,089	0·15	881	0·15	1,527	0·41	412	0·17	749	0·30	609	0·11	83,045	0·90	51	0·01	...	...	...	...	154	0·16	443	0·11
1915	668	0·02	238	0·05	1,638	0·05	...	...	1,166	0·18	1,472	0·38	561	0·22	878	0·30	770	0·13	104,298	1·04	53	0·01	133	0·10	...	...	174	0·16	649	0·13
1920	3,041	0·08	706	0·15	29,115	0·75	2,195	0·30	1,962	0·29	2,241	0·58	660	0·25	1,197	0·39	1,325	0·22	170,505	1·60	468	0·06	784	0·52	...	...	469	0·39	1,144	0·21
1925	2,563	0·07	448	0·09	19,871	0·49	2,503	0·32	2,198	0·30	2,223	0·57	687	0·25	1,889	0·55	1,748	0·29	175,449	1·51	550	0·06	783	0·48	32	0·84	612	0·46	1,836	0·31
1930	3,482	0·09	462	0·10	20,367	0·49	2,491	0·31	2,851	0·36	2,723	0·67	879	0·31	2,300	0·65	2,219	0·36	195,961	1·59	875	0·09	1,034	0·58	66	1·38	620	0·44	1,772	0·27
1935	3,942	0·10	520	0·10	21,004	0·51	2,575	0·31	2,971	0·35	3,015	0·73	983	0·34	2,992	0·81	2,716	0·44	218,000	1·71	1,431	0·13	1,369	0·70	66	1·22	653	0·44	2,331	0·35
1938	6,092	0·15	812	0·16	24,318	0·59	3,501	0·42	3,262	0·38	3,390	0·81	1,241	0·42	3,394	0·90	3,482	0·55	244,000	1·88	2,226	0·20	1,793	0·86	81	1·33	1,050	0·69	3,051	0·44
1940	7,602	0·18	794	0·16	11,070	0·28	1,803	0·22	2,947	0·33	3,093	0·73	965	0·32	3,472	0·91	3,487	0·55	264,000	2·00	2,369	0·21	1,765	0·82	68	1·05	1,059	0·69	3,205	0·46
1945	15,221	0·36	2,205	0·43	23,248	0·59	3,178	0·38	4,598	0·50	3,726	0·84	1,918	0·62	5,849	1·44	6,458	0·97	485,000	3·47	5,076	0·42	3,940	1·68	200	2·47	1,725	1·09	7,114	0·97
1946	29,100	0·68	2,878	0·56	51,946	1·29	5,653	0·68	10,116	1·07	4,298	0·96	2,064	0·66	7,500	1·83	6,988	1·04	610,000	4·35	7,683	0·63	5,238	2·20	247	2·96	2,133	1·29	7,155	0·96
1947	58,444	1·36	2,499	0·48	57,413	1·41	6,825	0·81	8,847	0·92	4,280	0·95	2,236	0·71	6,943	1·67	7,051	1·04	483,000	3·37	8,199	0·65	3,898	1·60	209	2·38	2,117	1·25	8,706	1·15
1948	42,711	0·98	2,020	0·39	47,015	1·14	6,518	0·76	8,038	0·82	4,292	0·94	2,129	0·67	7,120	1·70	6,782	0·99	408,000	2·79	6,881	0·54	3,764	1·50	212	2·10	1,853	1·07	7,184	0·93
1949	34,217	0·78	2,418	0·46	39,502	0·95	5,988	0·70	7,004	0·70	4,111	0·89	2,350	0·73	6,991	1·65	7,609	1·09	397,000	2·67	5,934	0·45	3,431	1·34	212	1·86	1,892	1·06	6,567	0·83
1950	30,331	0·69	2,185	0·42	35,391	0·84	5,100	0·59	6,462	0·64	4,241	0·90	2,324	0·71	6,868	1·61	8,008	1·14	385,000	2·55	5,373	0·39	3,612	1·38	204	1·63	1,633	0·91	7,358	0·90
1951	28,265	0·65	1,927	0·38	33,644	0·80	4,366	0·50	6,075	0·59	4,295	0·90	2,151	0·65	6,681	1·55	8,431	1·19	381,000	2·48	5,263	0·38	3,894	1·47	248	1·80	1,582	0·87	7,269	0·86
1952	33,274	0·76	2,701	0·53	32,532	0·76	4,211	0·48	5,828	0·56	4,188	0·87	2,116	0·64	6,753	1·55	8,159*	1·15*	...	...	5,634	0·39	...	...	264	1·74	1,684	0·90	7,042	0·81
1953	29,736	0·67	2,353	0·46	29,900*	0·70*	...	...	5,471	0·52	4,406	0·90	2,076	0·62	6,515	1·49	8,410*	1·17*	...	...	6,110	0·41	...	...	280	1·77	1,540	0·80	...	...

* Provisional.

Notes:

- (1) The data for countries other than England and Scotland have been obtained from the United Nations Demographic Year Books and the Statistical or Official Year Books of the individual countries.
- (2) All figures exclude annulments unless otherwise stated in (3) below.
- (3) Comments on data for certain countries:—

France. The figures for 1915 relate to 77 departments and those for 1940 and 1945 to 87 departments.

Belgium. The figures for 1940 exclude those for 41 communes not under Belgian administration.

United States. All figures are estimates of dissolutions plus annulments based on information reported by a varying number of States.

Union of South Africa } All figures relate to white population only.

Southern Rhodesia }

New Zealand. Annulments are included. All figures exclude Maoris.

TABLE 6. MARRIED POPULATION, DIVORCE PETITIONS FILED AND RATE PER 10,000 MARRIED POPULATION, 1911, 1921, 1937 AND 1950; AND THE PERCENTAGE INCREASE OF EACH IN THE INTERMEDIATE PERIODS; ENGLAND AND WALES

Year	Married population (thousands)	Petitions filed	Petitions filed per 10,000 married population	Period	Percentage increase in		
					Married population	Petitions filed per annum	Rate per 10,000 married population
1911 ...	13,126	859	0.65				
1921 ...	15,065	2,790	1.85	1911-21	15	225	185
1937 ...	18,644	5,750	3.08	1921-37	24	106	66
1950 ...	22,034	29,096	13.21	1937-50	18	406	329

TABLE 7. APPROXIMATE PROPORTION OF MARRIAGES TERMINATED BY DIVORCE, 1911 TO 1954, ENGLAND AND WALES

Year	Petitions filed	Average number of marriages contracted annually 5-15 years earlier (thousands)	Petitions per 100 marriages	Percentage of petitions resulting in decrees absolute	Estimated percentage of marriages terminated by divorce
1911 ...	859	257	0.3	75	0.2
1921 ...	2,790	284	1.0	80	0.8
1937 ...	5,750	302	1.9	85	1.6
1950 ...	29,096	369	7.9	90	7.1
1953 ...	29,845	381	7.8	90	7.0
1954 ...	28,347	385	7.4	90	6.7

TABLE 8. MARRIED POPULATION, DIVORCE ACTIONS* AND RATE PER 10,000 MARRIED POPULATION, 1911, 1921, 1937 AND 1950; AND THE PERCENTAGE INCREASE OF EACH IN THE INTERMEDIATE PERIODS; SCOTLAND

Year	Married population (thousands)	Divorce actions*	Actions per 10,000 married population	Period	Percentage increase in		
					Married population	Divorce actions* per annum	Rate per 10,000 married population
1911 ...	1,507	236	1.57				
1921 ...	1,678	520	3.10	1911-21	11	120	97
1937 ...	1,906	643	3.37	1921-37	14	24	9
1950 ...	2,247	2,216	9.86	1937-50	18	245	193

* Divorce actions in which final judgment given.

TABLE 9. APPROXIMATE PROPORTION OF MARRIAGES TERMINATED BY DIVORCE, 1911 TO 1954, SCOTLAND

Year	Divorce actions*	Average number of marriages contracted annually 5-15 years earlier (thousands)	Divorce actions per 100 marriages	Estimated percentage of marriages terminated by divorce
1911...	236	32	0.7	0.7
1921...	520	33	1.6	1.5
1937...	643	33	1.9	1.9
1950...	2,216	43	5.2	5.1
1953...	2,420	45	5.4	5.2
1954...	2,271	45	5.0	4.9

* Divorce actions in which final judgment given.

TABLE 10. DIVORCE* RATES PER 1,000 MARRIED WOMEN, BY WIFE'S PRESENT AGE AND DURATION OF MARRIAGE, 1953, ENGLAND AND WALES

Present age of wife		Duration of marriage in years						
		0-3	3-5	5-7	7-10	10-15	15-20	20 and over
Under 25	...	0.2	6.8	18.6	56.6	—	—	—
25-29	...	0.3	3.0	5.8	9.5	18.3	—	—
30-34	...	0.2	2.5	3.3	4.5	6.0	13.9	—
35-39	...	0.4	3.1	3.1	3.6	3.1	5.2	13.1
40-44	...	0.1	2.5	3.3	3.0	2.3	2.2	4.6
45-49	...	0.5	1.8	3.1	2.9	1.9	1.4	2.4

* Decrees absolute for divorce and nullity of marriage.

NOTE: In general, at each age the divorce rates increase with duration of marriage, though less so among older women; and at each duration the rates decline with advancing age, at first steeply and then more gradually. The general impression is of a contrast between rates of 2 or 3 per 1,000 in the main body of the table and higher rates running down the upper border of the table diagonally from left to right. These higher rates relate to younger than average ages at marriage.

In order to illustrate this last point the data have been re-arranged in Table 11 to give an approximate indication of divorce rates by age at marriage (instead of present age). This has been done by assuming, for example, that women now aged 30 to 35 who have been married 5-10 years were a corresponding number of years younger when they married than they are now, i.e., the rate may be related to a range of marriage ages from 20 to 30 with a nominal midpoint of 25. While this table indicates high risks of divorce for women married at young ages it should be borne in mind that (i) the higher risks are not confined to the very youngest ages and (ii) the rates at young ages at durations 5-15 relate to young girls married during the war or immediately after the war and may be inflated to the extent that there was any instability associated with war-time marriages.

TABLE 11. DIVORCE* RATES PER 1,000 MARRIED WOMEN, BY NOMINAL AGE AT MARRIAGE OF WIFE AND DURATION OF MARRIAGE, 1953, ENGLAND AND WALES

Nominal age on marriage of wife		Duration of marriage in years				
Range	Midpoint	0-5	5-10	10-15	15-20	
16-20	18†	} 1.9 {	21.2	18.3	13.9	
16-25	20		7.5	6.0	5.2	
20-30	25		4.1	3.1	2.2	
25-35	30		3.4	2.3	1.4	
30-40	35		3.1	1.9	—	
35-45	40	1.3	3.0	—	—	
40-50	45	1.1	—	—	—	

* Decrees absolute for divorce and nullity of marriage.

† The rates given for this *nominal* age group correspond to those of a group of *average actual* age at marriage of about 18½ years.

TABLE 12. DIVORCE* RATES PER 1,000 MARRIED WOMEN, BY WIFE'S PRESENT AGE AND DURATION OF MARRIAGE, 1953, SCOTLAND

Present age of wife	Duration of marriage in years						
	Under 3	3-5	5-7	7-10	10-15	15-20	20 and over
Under 25 ...	0.5	6.1	14.6	43.5	—	—	—
25-29 ...	0.3	2.0	4.0	8.0	12.5	—	—
30-34 ...	0.5	1.0	3.4	3.2	5.3	6.2	—
35-39 ...	0.2	1.3	1.6	2.2	2.0	4.4	10.3
40-44 ...	—	1.9	2.1	1.3	1.3	1.9	3.6
45-49 ...	0.9†	0.9†	1.5	0.9	1.5	0.6	2.1

* Includes nullity and dissolution of marriage on ground of presumption of death.

† These rates are calculated on one divorce only and should, therefore, be treated with reserve.

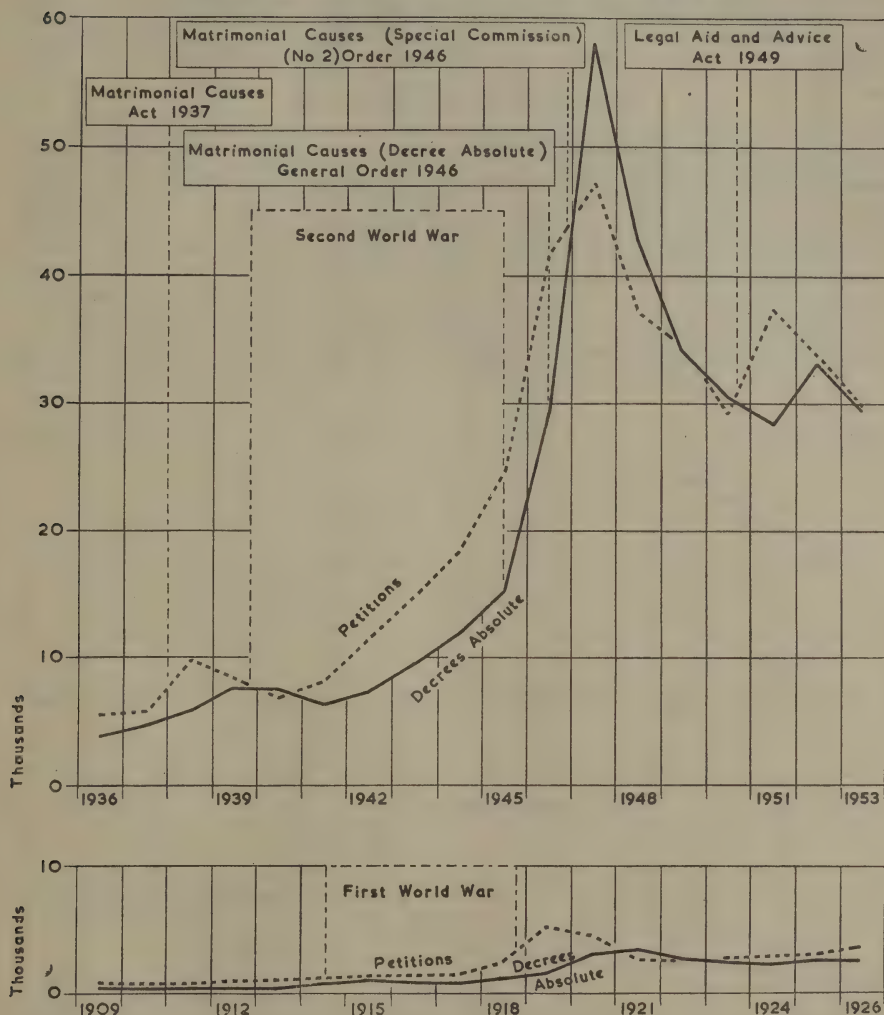
TABLE 13. DIVORCE* RATES PER 1,000 MARRIED WOMEN, BY NOMINAL AGE AT MARRIAGE OF WIFE AND DURATION OF MARRIAGE, 1953, SCOTLAND

Nominal age on marriage of wife		Duration of marriage in years				
Range	Midpoint	0-5	5-10	10-15	15-20	
16-20 ...	18†	} 1.7 {	16.9	12.5	6.2	
16-25 ...	20		5.8	5.3	4.4	
20-30 ...	25		3.3	2.0	1.9	
25-35 ...	30		2.0	1.3	0.6	
30-40 ...	35		1.5	1.5	—	
35-45 ...	40	0.9	1.1	—	—	
40-50 ...	45	0.9	—	—	—	

* Includes nullity and dissolution of marriage on ground of presumption of death.

† The rates given for this *nominal* age group correspond to those of a group of *average actual* age at marriage of about 18½ years.

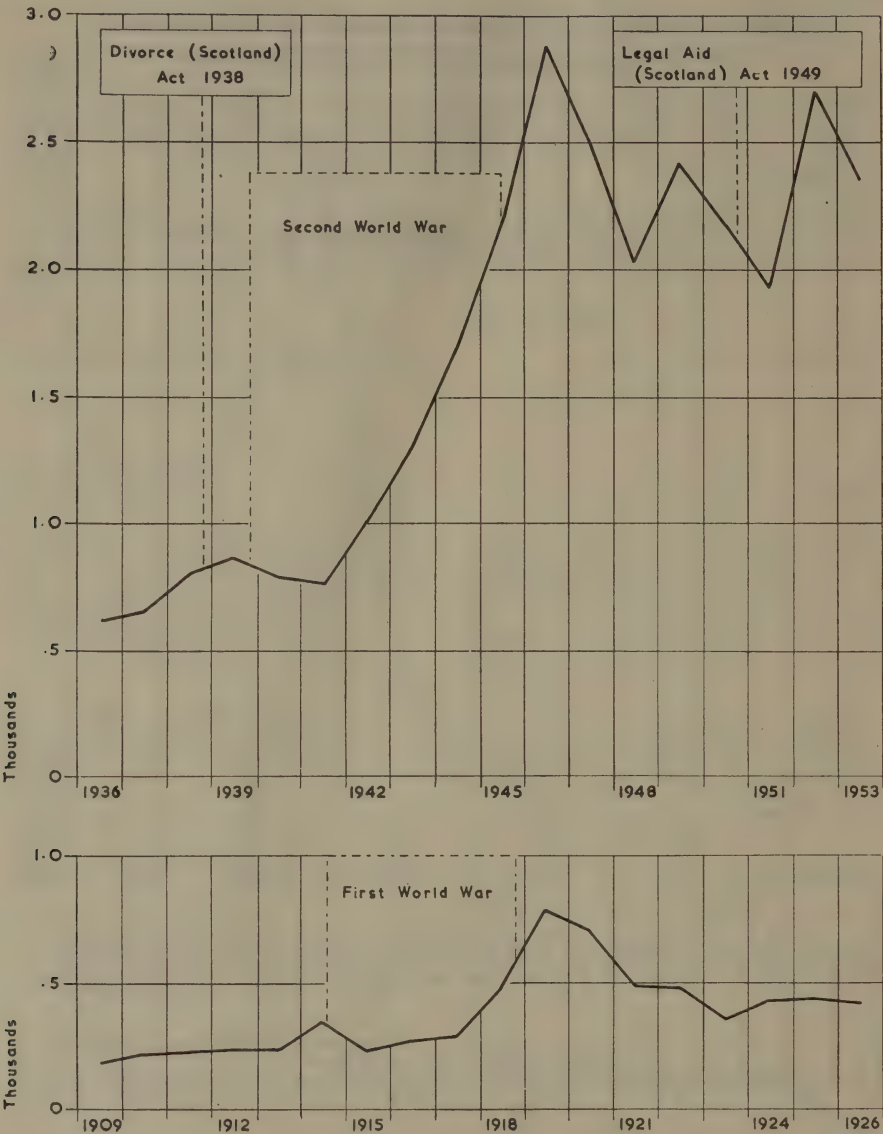
Diagram A. Petitions for Divorce and Decrees Nisi made absolute, 1909 to 1926 and 1936 to 1953, England and Wales



NOTES:

- (1) By the Matrimonial Causes (Decree Absolute) General Order, 1946, the period which must normally elapse before a decree *nisi* may be made absolute was reduced from six months to six weeks.
- (2) The Matrimonial Causes (Special Commission) (No. 2) Order, 1946, provided for the trial of matrimonial causes by Special Commissioners in Divorce.

Diagram B. Divorce Decrees granted, 1909 to 1926 and 1936 to 1953, Scotland



APPENDIX III

GROUND OF DIVORCE AND MATRIMONIAL PROPERTY SYSTEMS IN OTHER COUNTRIES

1. We have thought it of interest to give a summary of some of the information we obtained on the law and practice relating to divorce and other matrimonial matters in other countries. The law must be taken, generally speaking, to be that in force immediately before 1952, but we have taken account of subsequent changes in the grounds of divorce which have come to our notice.

(1) GROUNDS OF DIVORCE

2. The grounds of divorce in other countries are presented in the form of tables giving the grounds in (i) Northern Ireland, the Channel Islands, the Isle of Man and some other Commonwealth countries, (ii) some European countries, (iii) the territories and possessions of the United States of America. Under the laws of the Irish Republic, Italy and Spain a divorce cannot be obtained. We have described in the explanatory notes the more important respects in which particular grounds of divorce vary from one country to another; it has not been possible to give a full account of all the conditions under which divorce is granted.

3. We have omitted any reference to proceedings by one spouse for the dissolution of the marriage on the ground that the death of the other spouse may be presumed. Such proceedings are allowed by the law of a number of countries.

TABLE 1. GROUNDS OF DIVORCE IN SOME OTHER COMMONWEALTH COUNTRIES

NOTE: The table should be read in conjunction with the explanatory notes. A cross indicates that the ground is available in that country. Where a number is shown instead it represents the number of years required before the ground can be established, except in the case of imprisonment where it represents the minimum length of sentence.

	Adultery	Rape	Sodomy, bestiality	Cruelty	Conviction of attempt to murder petitioner or of grievous assault on petitioner	Drunkenness	Detention after commutation of death sentence	Imprisonment	Frequent convictions of crime	Desertion	Non-compliance with decree for restitution of conjugal rights	Habitual failure to pay main-tenance under court order or separation agreement	Separation after court order	Separation by agreement	Separation and cohabitation unlikely to be resumed	Insanity	Impotency	Consanguinity	Duress or fraud	Incontinency before marriage	Nonage	Insanity at time of marriage
Northern Ireland ...	x	x	x	x			x	15		3						5						
Jersey ...	x	x	x	x			x	15		3						5						
Guernsey ...	x	x	x	x		3	x	15		3						5						
Isle of Man ...	x	x	x	x						3						5						
Australia:																						
New South Wales (and Australian Capital Territory)	x	x	x	1	x	3	x	7	x	3	x											
Queensland ...	x		x							3						5						
Western Australia ...	x		x		x	4	x	7	x	3		3			5		x		x	x		
South Australia ...	x	x	x	1	x	3	x	7	x	3	3	3	5			5			x			
Victoria ...	x	x	x	1	x	3	x	7	x	3						5				x	x	

Tasmania	...	...	x	x	x	1	x	3	x	7	x	2-3								7
Northern Territory	...	...	x	x	x	1	x	3	x	7	x	3								5
Canada:																				
Alberta	...	...	x	x			x													
British Columbia	...	...	x	x			x													
Manitoba	...	...	x	x			x													
New Brunswick	...	...	x																x	x
Newfoundland	...	...																
Nova Scotia	...	...	x								x									
Ontario	...	...	x	x			x													
Prince Edward Island	...	...	x																x	x
Quebec	...	...																
Saskatchewan	...	...	x	x			x													
New Zealand	...	...	x	x			x	4	x			3	3	3	3	3	7			5-7
Union of South Africa	...	...	x									x	x							7
Southern Rhodesia	...	...	x								x	3								5

EXPLANATORY NOTES:

(1) *General*

- (a) In Newfoundland and Quebec, a divorce can be obtained only by a Private Act of the Federal Parliament. The normal ground is adultery.
- (b) Impotency, consanguinity, duress or fraud, nonage and insanity at the time of the marriage are usually grounds of nullity in those countries where they are not grounds of divorce.

(2) *Adultery*

- (a) In Victoria, a wife may obtain a divorce on the ground of her husband's adultery only if it is coupled with incest, bigamy, cruelty or desertion for two years or if it is repeated or committed in circumstances of aggravation.
- (b) In Southern Rhodesia, the ground includes rape, sodomy or bestiality on the part of the husband.

(3) *Cruelty*

- (a) In New South Wales, Victoria and Tasmania, the ground is repeated assaults and cruel beatings.
- (b) In New Zealand, cruelty is not of itself a ground of divorce, but it is a ground of judicial separation, which after three years becomes a ground of divorce.
- (c) In Southern Rhodesia, cruelty includes habitual drunkenness or mental cruelty to a degree which makes the continuance of married life insupportable.

(4) *Conviction of attempt to murder petitioner or of grievous assault on petitioner*

- (a) In Tasmania, the ground is conviction of attempt to murder the petitioner.
- (b) In New Zealand, the ground includes conviction of a similar offence against a child of either spouse.

(5) *Drunkenness*

- (a) In Guernsey, the drunkenness must be such that cohabitation is a grave hardship on the petitioner.
- (b) In countries other than Guernsey, the drunkenness must be coupled with unfitness for or neglect of domestic duties on the part of the wife or, on the part of the husband, failure to maintain or (except in South Australia and Northern Territory) cruelty.
- (c) In Victoria and Tasmania, the ground includes habitual drug-taking.

(6) *Detention after commutation of death sentence*

- (a) Except in New Zealand, the respondent must have been detained for at least 2-3 years before proceedings can be started.
- (b) In Jersey and Guernsey, detention includes detention as a criminal lunatic.
- (c) In New Zealand, the ground is conviction of murder.

(7) *Imprisonment*

- (a) The respondent must have been in prison for at least 2-3 years before proceedings can be started.
- (b) In Southern Rhodesia, the ground is imprisonment for life.

(8) *Frequent convictions of crime*

- (a) In the Australian States (except Queensland) it is a ground on a wife's petition only and must be coupled with habitual failure to support; the respondent must have been sentenced in the aggregate to at least three years' imprisonment in the five years before the start of the proceedings. Tasmania has a similar ground but it is open to both husband and wife and does not have to be coupled with failure to support.
- (b) In the Union of South Africa and Southern Rhodesia, the respondent must have been declared an habitual criminal and have been in prison for at least five years after the declaration; the ground is open to both husband and wife.

(9) *Desertion*

- (a) In Tasmania, wilful or non-justifiable refusal to permit marital intercourse is equivalent to desertion; the ground is two years' desertion by a husband, three years' by a wife. In Southern Rhodesia, refusal of the marital privileges ranks as desertion.
- (b) In the Union of South Africa, the ground is malicious desertion. No minimum period is prescribed (except in Natal where two years must elapse between the date of the desertion and final decree). It is usual to bring an action for a decree for restitution of conjugal rights, non-compliance with which entitles the petitioner to divorce.

(10) *Non-compliance with decree for restitution of conjugal rights*

This ranks as desertion.

(11) *Habitual failure to pay maintenance under court order or separation agreement in New Zealand, this ranks as desertion.*

(12) *Separation*

- (a) In Western Australia, the court must refuse a decree if it is proved that the petitioner (i) has within the previous five years been guilty of adultery, sodomy or bestiality, or has been convicted of attempted murder of the respondent or of assault on the respondent with intent to inflict grievous bodily harm or has been convicted of a criminal offence and sentenced to imprisonment for a period exceeding three years or for periods amounting in the aggregate to at least three years, or (ii) is in default at the time of the proceedings in respect of maintenance payments under a previous court order or an agreement for the payment of maintenance for the respondent or a child of the marriage.
- (b) In South Australia, where a husband against whom a court order for separation has been made is claiming divorce on the ground of separation, the court may refuse to grant a divorce until he has made proper provision for the maintenance of the wife and children.
- (c) In New Zealand, the court must refuse a decree if the respondent satisfies the court that the separation was due to the wrongful act or conduct of the petitioner.

(13) *Incontinency before marriage*

This must be such—

- (a) on the part of the wife, that she is pregnant by a man other than her husband at the time of the marriage, or
- (b) on the part of the husband, that a woman other than his wife is pregnant by him at the time of the marriage.

TABLE 2. GROUNDS OF DIVORCE IN SOME EUROPEAN COUNTRIES

NOTE: The table should be read in conjunction with the explanatory notes. A cross indicates that the ground is available in that country. Where a number is shown instead it represents the number of years required before the ground can be established, except in the case of imprisonment where it represents the minimum length of sentence.

	Adultery	Bigamy	Other serious sexual misconduct	Violence endangering, or attempt on, life of petitioner (<i>exces</i>)	Cruelty (<i>services</i>)	Intolerable conduct (<i>injures graves</i>)	Cruelty to children	Refusal to have children; insistence on use of contraceptives	Inevitable gambling	Exposure to risk of venereal disease	Drunkenness	Imprisonment	Desertion	Separation after court order	Separation	Breakdown of marriage	Mutual consent	Insanity	Leprosy	Severe contagious or repulsive disease	Impotency
Austria ...	x					x		x						3				x		x	
Belgium ...	x			x	x	x	x				x	5		3			x		x		
Bulgaria ...	x			x	x	x										x					
Czechoslovakia ...										x		2	2	1½-2½	4	x		3			
Denmark ...	x	x	x	x	x	x						x		3	3			x		x	
France ...	x			x	x	x															
Germany (Western) ...	x					x							2			x		x		x	
Greece ...	x	x		x												x		4	x		3
Hungary ...												4	5	5		x					
Netherlands ...	x			x																	
Norway... ..	x	x	x	x	x		x			x		3	2	1-2	3			3			

Intolerable conduct (injures graves)

- (a) The conduct which will establish this ground varies from country to country; it may consist of mental cruelty, ill-treatment falling short of physical cruelty, desertion, conviction of crime, immoral conduct.
- (b) In Austria, France and Western Germany, the court has a discretion to withhold a decree, but, in Austria and Western Germany, only if the conduct is due to the mental illness of the respondent.

(7) Drunkenness

In Sweden, the court has a discretion to withhold a decree.

(8) Imprisonment

- (a) In some countries the ground is conviction of a degrading crime. There are often restrictions on the time at which proceedings can be brought. In France and Portugal the ground includes deportation and in Portugal suspension of political rights.
- (b) In Sweden, the court has a discretion in certain circumstances to grant divorce even if the respondent has been sentenced to a period of less than three years.

(9) Desertion

In Switzerland, the petitioner must first obtain a decree for restitution of conjugal rights on the ground of two years' desertion or absence without reasonable excuse; the respondent has six months within which to obey.

(10) Separation after court order

(a) In Belgium, this ground is available only to the spouse who obtained the judicial separation.

(b) In Denmark, Norway and Sweden, a legal separation may be obtained (i) by husband and wife applying together on the ground that by reason of grave dissension they are unable to continue cohabitation, or (ii) by one spouse on the ground of grave neglect or disregard of marital duties by the other, a dissolute life being led by the other, or grave dissension owing to incompatibility of temperament or other cause.

(c) In Denmark and Norway, the shorter period applies on an application by both spouses jointly, the longer period on an application by only one spouse.

(d) In the Netherlands, judicial separation may be obtained, *inter alia*, on the ground of extravagance, gross insults, or, at the joint request of both parties, without giving any definite reason. Divorce is granted if reconciliation is not possible and the respondent consents.

(e) In Switzerland, where a judicial separation is granted (i) for a definite period, either spouse may apply for divorce at the end of that period, (ii) for an indefinite period, either spouse may apply for divorce at the end of three years.

(11) Separation

In Austria, Denmark, Western Germany and Sweden, divorce will not be granted if the other spouse objects and the court considers it reasonable that the marriage should not be dissolved.

(12) Breakdown of marriage

(a) This is the only ground of divorce in Czechoslovakia, Hungary, Poland and Russia. The court has complete discretion to grant a divorce and will be guided by the fact that the marriage does not provide normal conditions for a joint life and the upbringing of children. The conduct of the applicant may bar him or her from obtaining a decree unless the other spouse consents. The interests of the children have to be considered.

(b) In Greece and Switzerland, either spouse may ask for divorce where the conjugal relations are so seriously strained that married life has become intolerable but the spouse who is chiefly at fault will not be granted a divorce on this ground.

(13) *Mutual consent*

This ground is subject to a number of restrictions designed to ensure that it is not lightly resorted to.

(14) *Insanity*

In Austria, Western Germany and Greece, the court has a discretion to withhold a decree.

(15) *Severe contagious or repulsive disease*

(a) In Austria and Western Germany, the court has a discretion to withhold a decree.

(b) In Bulgaria, the ground is disease likely to expose the health of the petitioner or of the children to serious danger.

TABLE 3. PRINCIPAL GROUNDS OF DIVORCE IN THE TERRITORIES AND POSSESSIONS OF THE UNITED STATES OF AMERICA

NOTE: The table should be read in conjunction with the explanatory notes. A cross indicates that the ground is available in that State. Where a number is shown instead it represents the number of years required before the ground can be established, except in the case of imprisonment where it represents the minimum length of sentence.

	Adultery	Bigamy	Unnatural acts	Violence endangering, or attempt on, life of petitioner	Cruelty	Intolerable conduct	Drunkenness	Drug-taking	Imprisonment	Desertion	Non-support of wife	Neglect	Vagrancy of husband	Separation after court order	Separation	Incompatibility	Insanity	Disease	Impotence	Nonage	Prohibited degrees	Force or duress	Fraud	Insanity at time of marriage	Conviction of felony or infamous crime	Pregnancy of wife before marriage
Alabama	x		x		x		x	x	7	1	2				5		5		x						x	
Arizona	x				x		x		x	1	1			5					x					x		
Arkansas	x	x		x		x	1		x	1				3					x							
California	x				x		1	1	x	1	1					3			x							
Colorado	x	x		x	x		1	1	x	1	1					5			x							
Connecticut	x			x	x		x	1	x	3						5										
Delaware	x	x		x	x		2		2	2	x					5				x		x				
District of Columbia	x								2	2				2	5											
Florida	x	x		x	x	x	x			1									x		x					
Georgia	x			x	x		x		2	1									x		x				x	
Idaho	x				x		x		x						5		3									

[illegible]

	Adultery	Bigamy	Unnatural acts	Violence endangering, or attempt on, life of petitioner	Cruelty	Intolerable conduct	Drunkenness	Drug-taking	Imprisonment	Desertion	Non-support of wife	Neglect	Vagrancy of husband	Separation after court order (or decree)	Separation	Incompatibility	Insanity	Disease	Impotence	Nonage	Prohibited degrees	Force or duress	Fraud	Insanity at time of marriage	Conviction of felony or infamous crime before marriage	Pregnancy of wife before marriage
North Carolina	x		x				1		x	1		1			2		10		x						x	
North Dakota	x				x				x	1		x					5		x				x			
Ohio ...	x	x			x		x		x	1		x					5		x				x		x	
Oklahoma ...	x	x			x		x		x	1		x					5		x				x		x	
Oregon ...	x				x		1		x	1							5		x				x		x	
Pennsylvania ...	x	x		x		x			2	2	1				10				x				x			
Rhode Island ...	x				x	x	x			5									x				x			
South Carolina	x				x					1																
South Dakota...	x				x		1		x	1		1					5		x							
Tennessee ...	x	x		x	x	x	x		x	2	x								x						x	
Texas ...	x				x	x			x	3					10		5		x							
Utah ...	x				x		x		x	1		x		3			5									
Vermont ...	x								3	3	x				3		5									
Virginia ...	x					x			x	2				2			5		x					x	x	

(5) *Violence endangering, or attempt on, life of petitioner*

In Louisiana, this is a ground of judicial separation, which may later be converted into a divorce by either party.

(6) *Cruelty*

(a) In the District of Columbia, Louisiana and Virginia, this is a ground of judicial separation, which may later be converted into a divorce by either party.

(b) In Tennessee, the court has a discretion to decree a judicial separation instead of a divorce.

(7) *Intolerable conduct*

(a) The ground is expressed in a number of States as personal indignities rendering life intolerable.

(b) In Louisiana, this is a ground of judicial separation, which may later be converted into a divorce by either party.

(c) In Tennessee, the court has a discretion to decree a judicial separation instead of a divorce.

(8) *Drunkenness*

In Kentucky, on a wife's application, the drunkenness must be coupled with failure to support.

(9) *Imprisonment*

The ground is often expressed as conviction of felony or of an infamous crime.

(10) *Desertion*

(a) In Louisiana, this is a ground of judicial separation, which may later be converted into a divorce by either party.

(b) In Rhode Island, the court has a discretion to grant a divorce in respect of desertion for less than five years.

(11) *Non-support of wife*

In Tennessee, the court has a discretion to decree a judicial separation instead of a divorce.

(12) *Neglect*

In Idaho, Montana, North and South Dakota and Utah, the ground is wilful neglect; in Kansas, Ohio and Oklahoma, it is gross neglect of duty. It would appear that this is wider than the ground of non-support of wife since it is open to a husband petitioner and may apply to neglect other than neglect to maintain.

(13) *Separation after court order*

In the District of Columbia, application may be made only by the spouse who obtained the court order.

(14) *Separation*

(a) In Nevada and Rhode Island, the court has a discretion to withhold a decree.

(b) In Vermont and Wyoming, a divorce will not be granted if the separation was due to the applicant's conduct.

(15) *Insanity*

- (a) In Arkansas, if the spouses have been separated for at least three years by reason of one spouse's insanity, a divorce may be obtained on the ground of separation.
- (b) In South Dakota and Washington, the court has a discretion to withhold a decree.

(16) *Disease*

- (a) In Illinois, the ground is communication of venereal disease.
- (b) In Kentucky, the ground is concealing or contracting a loathsome disease.
- (c) In Hawaii, the ground is leprosy.

(2) MATRIMONIAL PROPERTY SYSTEMS

4. The two main divisions of matrimonial property systems¹ are systems based on separation of property and community of property, respectively. The systems current in England and Scotland are based on separation of property and have been described in Part IX of our Report. The general principles of a community of property system have also been described in that Part (see paragraph 631). We give below a more detailed account of four different kinds of matrimonial property system based on community of property.

Southern Rhodesia

5. The system in Southern Rhodesia is founded on Roman-Dutch law and rests on what may be called a full community of property between husband and wife; that is to say, all property owned by them at the time of the marriage or acquired subsequently becomes with few exceptions community property.

6. Before 1929, all marriages had, as a consequence, community of property and of profit and loss, and the wife became subject to the marital power vested in the husband. All or any of these consequences could be avoided by husband and wife entering into an ante-nuptial contract regulating their property rights and excluding the husband's marital power. The Married Persons Property Act provides, however, that community of property and of profit and loss and the marital power are not to attach to any marriage entered into after 1st January, 1929, unless both husband and wife, before the marriage, have expressed in writing, observing the formalities prescribed, their wish not to be bound by the statutory provisions². If this has been done the marriage is subject to community of property.

7. Under the community of property system, all property becomes the joint property of the husband and wife in equal undivided shares, except, for instance, property given or bequeathed to the husband or the wife on condition of its exclusion from the community rights. Similarly, the spouses' liabilities incurred before marriage become their joint liability. The profits made by either spouse during the marriage fall into the community, and the losses incurred by either are shared by both.

8. By virtue of his marital power, the husband is the sole administrator of the joint estate. He alone has full legal capacity, the position of the wife being similar to that of a minor. Hence, he has power to make contracts and incur debts or to dispose of the joint property and any separate property of his wife. Should he, however, squander the joint property or her separate property, or dispose of it with intent to defraud her, the wife may apply to the court for a division of the community property and an interdict restraining her husband from administering her separate property.

9. An ante-nuptial contract (which may, in certain circumstances, be post-nuptially executed) may wholly or partly exclude the consequences of marriage in community. It may also include clauses effecting settlements upon one of the spouses or any child to be born of the marriage. Apart from the matter of settlements, the form of ante-nuptial contract almost invariably executed is one which totally excludes all community and the marital power. The wife is, then, as regards her property and capacity, in the same legal position as an unmarried woman of full age. The spouses have no common property or joint liability. Each spouse retains as his or her separate property the property acquired by him or her before or during the marriage.

10. Most marriages which take place now are governed by the provisions of the Married Persons Property Act, but there are still in existence many marriages subject to community of property. The consequences of a marriage to which the provisions of the Act apply are exactly the same as those of a marriage in which by ante-nuptial contract all community and the husband's marital power have been excluded.

11. The effect of divorce upon the property and liabilities of the spouses depends upon whether the marriage was in or out of community. If the marriage was in

¹ Matrimonial property systems are fully discussed in *Matrimonial Property Law*, edited by Professor W. Friedmann (Stevens & Sons, Ltd., 1955).

² Roman-Dutch law also forms the basis of a similar property system in the Union of South Africa. In the Union, however, it is still the rule that a marriage is presumed to be in community of property until the contrary is proved.

community, the community is dissolved and, unless the court orders otherwise (see paragraph 12), each spouse is entitled to receive a half-share of the joint estate. Before the estate is distributed its debts must be liquidated. If the marriage was out of community, each spouse retains on divorce his or her separate property, whether acquired before or during the marriage, unless the court orders otherwise (see paragraph 12) and remains solely liable for his or her debts.

12. On divorce, the innocent party may claim his normal rights of property accrued by virtue of the marriage; or instead, he may ask the court for an order compelling forfeiture by the guilty spouse of benefits derived from the marriage. The court has a discretion:

- (i) to grant an order declaring the defendant to have forfeited all such benefits; or
- (ii) to grant an order declaring the defendant to have forfeited only such benefits as may be named in the order; or
- (iii) to refuse to grant any such order.

The innocent spouse will normally elect to follow the course most advantageous to him. This depends, when the marriage was in community, on whether he contributed the greater share to the joint estate or not. Where the marriage was under antenuptial contract, the innocent spouse may choose to abide by the contract, retain his own property, including any property acquired under the contract, and enforce any settlement made under the contract but not yet carried out; or he may choose to ask that the guilty spouse should return any property settled upon her under the contract, and claim cancellation of any promise he has made to the guilty spouse under the contract but not yet carried out. When the marriage is one to which the provisions of the Married Persons Property Act apply, forfeiture of benefits can arise only where the innocent spouse has settled or promised to settle property on the guilty spouse.

France

13. French law gives to a husband and wife considerable liberty in drawing up a marriage contract according to their wishes and their interests. There are a number of typical forms which may be adopted. If no contract is made, husband and wife are bound by a statutory system based on community of property. They may also choose in their marriage contract to be bound by this system.

14. Under the community system, a common fund is set up, jointly owned by husband and wife in undivided shares. The fund comprises:

- (i) all moveable property owned by the spouses at the time of the marriage;
- (ii) all moveable property acquired by either spouse during the marriage whether by gift, bequest or succession or by onerous title (for instance, by purchase);
- (iii) all immoveable property acquired during the marriage by onerous title;
- (iv) the profits of the separate property of either spouse.

The husband's earnings are part of the common fund but by law the wife is entitled to her earnings (known as reserved property) during the marriage and may deal with them as she thinks fit. All other property remains the separate property of the husband or wife. The common fund is subject to debts contracted by the husband and to debts contracted by the wife for household necessities or with the husband's consent.

15. The husband is entitled to administer not only his separate property and the common fund but also the wife's separate property. His powers are, however, restricted by law; for instance, he may not make gifts of the community property without the wife's consent.

16. The wife cannot in any way dispose of her separate property without her husband's consent. However, she may apply to the court:

- (i) for authority to proceed with a transaction if her husband unjustly withholds his consent, and
- (ii) for authority to represent her husband in order to exercise his rights under the community if he is unable to administer the property, for instance because he is absent or missing.

Where the wife unjustly withholds her consent, the husband has a similar right to apply to the court.

17. On divorce, the community is dissolved. Husband and wife take possession of their separate property. Each is also entitled to one-half of the community property, which for this purpose includes the wife's reserved property, if any. Account is taken of debts owed by the community to the husband or wife in respect of his or her separate property, and *vice versa*. The wife has been given certain safeguards designed to protect her from being made liable for the debts of the common fund on its dissolution.

18. The other systems which a husband and wife may choose to regulate their property rights in the marriage contract are:

- (a) the system without community;
- (b) the system of separate property;
- (c) the dotal system;
- (d) the system of community of "*acquêts*".

19. Under the system without community, there is no common fund but the husband is entitled to administer his own and the wife's separate property.

20. Under the system of separate property, husband and wife retain ownership of their separate property and may enjoy, manage and dispose of it alone.

21. Under the dotal system the wife's property is divided into dotal property (her dowry) and personal property. The husband is entitled to the management and enjoyment of the dotal property, the ownership of which remains vested in the wife. The dotal property cannot in principle be alienated, but either spouse may apply to the court for authority to do so. The wife has full rights of administration and disposal over her personal property.

22. Under the system of community of "*acquêts*", there is a common fund, as in a full community system, but the fund is restricted to property acquired by onerous title (for instance, by purchase) during the marriage. In other respects, the statutory rules of the community system apply.

Norway

23. The principal difference between the matrimonial property system in Norway (and the other Scandinavian countries) and those just described is that in Norway the spouse who brings property into the marriage or acquires property during the marriage continues to own and administer it independently of the other spouse. The latter, however, has certain rights over this property and is entitled, subject to an order of the court, to one-half of it when the community is dissolved.

24. All property belonging to the husband and wife at the time of the marriage or acquired afterwards is, with a few exceptions, classed as their matrimonial property. The principal exception consists of property specifically excluded by a marriage contract or property acquired on condition that it should be kept separate, for instance under the terms of a will³. A pension also remains the separate property of the spouse to whom it has been granted.

25. A spouse may not deal with the matrimonial property which he is administering in a manner detrimental to the interests of the other spouse. Moreover, he must obtain the other spouse's consent before he can sell or mortgage or pledge the matrimonial home and its contents or other property upon which his livelihood or that of the other spouse depends.

26. If one spouse is likely to become or becomes bankrupt, or if he is mismanaging his part of the matrimonial property, the other spouse has the right to apply to the court for a division of the property. A division will also be ordered by the court on the joint application of husband and wife. Each is then entitled to take one-half of the matrimonial property.

27. The matrimonial property must also be divided when the marriage is dissolved or the parties are legally separated. If the proceedings are based on the commission

³ Income derived from separate property is regarded as matrimonial property unless specifically excluded.

of a matrimonial offence, the innocent spouse may claim certain additional benefits. Where adultery has been committed, the innocent spouse is entitled to take from the matrimonial property over which he has control an amount corresponding to the amount which he contributed during the marriage and the remainder is then divided in equal shares. The court has a discretion to allow this to be done in other cases.

Louisiana, U.S.A.

28. In Louisiana, marriage gives rise to a community of property between husband and wife, unless they have agreed to the contrary in a marriage contract⁴. It is not a full community of property, being limited, generally speaking, to the following property acquired by the spouses during the marriage:

- (i) the income from the property administered by the husband (see paragraph 29);
- (ii) the “produce of the reciprocal industry and labour of both husband and wife”; this consists of the earnings of the husband, and also those of the wife unless she is living separate and apart from her husband;
- (iii) property acquired by the spouses during the marriage by gift made to them jointly or by purchase from the common fund.

29. The husband is entitled to administer the community property as well as his separate property. He also administers the wife's dotal property (her dowry) and may administer her paraphernal property (personal property). The wife may choose, however, to administer her personal property and she is then entitled to the profits from it if she specifically reserves them to herself by affidavit. The husband is restricted to some extent in his dealings with the community property. For instance, he may not dispose of property in the wife's name without her consent. In addition, if the wife has declared property to be the family home, it cannot be disposed of without her consent. Moreover, the husband cannot give away immoveable property, except for the setting up in life of the children of the marriage. The wife has a legal mortgage on the husband's property in respect of her dotal and paraphernal property under his control.

30. The community is dissolved on divorce or judicial separation and the community property must then be divided equally between the spouses.

⁴ Such agreements are rare today.

APPENDIX IV

DRAFT CODE (JURISDICTION AND RECOGNITION)

Note.—The Code embodies the Commission's recommendations for England in respect of the basis of matrimonial jurisdiction and the recognition of the jurisdiction of other countries (see Part XII). The Code for Scotland is the same save for the omission of Section 11, which represents the present law in Scotland. In addition, the Commission is endorsing the recommendations of the majority in the Lord Chancellor's Standing Committee on Private International Law with regard to the concept of domicile.

PART I—JURISDICTION OF THE COURT

1. The court shall have jurisdiction to entertain proceedings for divorce if
 - (a) the petitioner is domiciled in England at the commencement of the proceedings, or
 - (b) the petitioner is in England at the commencement of the proceedings and the place where the parties to the marriage last resided together was England, or
 - (c) the parties to the marriage are both resident in England at the commencement of the proceedings:

Provided that the court shall not grant a decree of divorce in the exercise of jurisdiction under sub-paragraphs (b) or (c) unless (i) the personal law or laws of both the parties recognise as sufficient ground for a divorce or nullity of marriage a ground substantially similar to that on which a divorce is sought in England, or (ii) the personal law or laws of both the parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground.

2.—(1) In addition to the jurisdiction given to the court under Section 1, the court shall have jurisdiction to entertain proceedings for divorce if the petitioner is a citizen of the United Kingdom and Colonies and is domiciled in a country, the law of which requires questions of personal status to be determined by the law of the country of which the petitioner is a national and does not permit divorce to be granted on the basis of the petitioner's domicile or residence.

(2) In proceedings brought under the provisions of subsection (1) above, the issues shall be determined in accordance with the law which would be applicable thereto if the petitioner were domiciled in England at the commencement of the proceedings.

3.—(1) The court shall have jurisdiction to entertain proceedings for presumption of death and dissolution of marriage if

- (a) the petitioner is domiciled in England at the commencement of the proceedings, or
- (b) the petitioner is resident in England at the commencement of the proceedings.

(2) In proceedings brought under the provisions of subsection (1) (b) above, the issues shall be determined in accordance with the law which would be applicable thereto if the petitioner were domiciled in England at the commencement of the proceedings.

4.—(1) The court shall have jurisdiction to entertain proceedings for declaring a nullity any marriage alleged to be void if

- (a) the petitioner is domiciled in England at the commencement of the proceedings, or
- (b) the petitioner is in England at the commencement of the proceedings.

(2) If the marriage is alleged to be void on the ground of lack of formalities, that issue shall be determined in accordance with the law of the country in which the marriage ceremony took place.

(3) If the marriage is alleged to be void on a ground other than that of lack of formalities, that issue shall be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties); Provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out.

5. The court shall have jurisdiction to entertain proceedings for the annulment of a marriage alleged to be voidable if

- (a) the petitioner is domiciled in England at the commencement of the proceedings, or
- (b) the petitioner is in England at the commencement of the proceedings and the place where the parties to the marriage last resided together was England, or
- (c) the parties to the marriage are both resident in England at the commencement of the proceedings:

Provided that the court shall not grant a decree of nullity unless the personal law or laws of one or the other or both of the parties at the time of the marriage recognise as sufficient ground for nullity of marriage or divorce a ground substantially similar to that on which an annulment is sought in England.

6.—(1) For the purpose of establishing the jurisdiction of the court under Sections 1, 3, 4 and 5 of this Code, a wife who is living separate and apart from her husband shall be entitled to claim a separate English domicile notwithstanding that her husband is not domiciled in England at the commencement of the proceedings, provided that in the circumstances, had she been a single woman, the court would regard her as having an English domicile.

(2) Where a wife who is claiming a separate English domicile under the provisions of subsection (1) above, was domiciled in England immediately before the marriage, or immediately before the separation from her husband, and is resident in England at the commencement of the proceedings, she shall be deemed to have acquired an English domicile unless there is evidence to the contrary.

PART II—RECOGNITION OF OTHER JURISDICTIONS

7. The court shall recognise as valid a divorce, obtained by judicial process or otherwise,

- (a) which has been granted in accordance with the law of the country in which one spouse was, or both spouses were, domiciled at the time of the proceedings, or which would be given recognition by the law of that country; or
- (b) which has been granted in accordance with the law of the country of which one spouse was a national, or both spouses were nationals, at the time of the proceedings, or which would be given recognition by the law of that country; or
- (c) which has been granted in circumstances substantially similar to those in which the court in England exercises divorce jurisdiction in respect of persons who are not domiciled in England; or
- (d) which has been granted, before the coming into operation of any statute altering the basis of divorce jurisdiction in England, in circumstances substantially similar to those in which the court in England exercised divorce jurisdiction at the date of the divorce; or
- (e) which has been granted in any other Commonwealth country within a period of three years after the coming into operation of any statute altering the basis of divorce jurisdiction in England, in circumstances substantially similar to those in which the court in England exercised divorce jurisdiction before the alteration in its jurisdiction took place; or
- (f) which has been granted in any country designated by Order in Council.

8. The court shall recognise as valid an annulment of a marriage, obtained by judicial process or otherwise,

- (a) which has been granted in accordance with the law of the country in which one spouse was, or both spouses were, domiciled at the time of the proceedings, or which would be given recognition by the law of that country; or
- (b) which has been granted in accordance with the law of the country of which one spouse was a national, or both spouses were nationals, at the time of the proceedings, or which would be given recognition by the law of that country; or
- (c) which has been granted on the ground that the marriage is void, in accordance with rules for the choice of law which are the same as those followed by the court in England under Section 4 (2) and (3) of this Code; or
- (d) which has been granted on the ground that the marriage is voidable, in circumstances substantially similar to those in which the court in England exercises jurisdiction to annul a voidable marriage in respect of persons who are not domiciled in England; or
- (e) which has been granted, before the coming into operation of any statute altering the basis of nullity jurisdiction in England, in circumstances substantially similar to those in which the court in England exercised nullity jurisdiction at the date of the annulment of marriage; or
- (f) which has been granted in any other Commonwealth country within a period of three years after the coming into operation of any statute altering the basis of nullity jurisdiction in England, in circumstances substantially similar to those in which the court in England exercised nullity jurisdiction before the alteration in its jurisdiction took place; or
- (g) which has been granted in any country designated by Order in Council.

PART III—INTERPRETATION

9.—(1) For the purpose of this Code, the personal law of a party shall be:

- (a) the domestic law of the country in which that party is domiciled, if, under the rules of private international law of that country, questions of personal status are governed by the law of the country in which a person is domiciled; failing which
- (b) the domestic law of the country of which that party is a national, if, under the rules of private international law of that country, questions of personal status are governed by the law of the country of which a person is a national; failing which
- (c) the domestic law of the country in which that party is domiciled.

(2) Where the court is required under subsection (1) (b) above to look to the law of a party's nationality and he has more than one nationality, he shall be taken to be a national of that country in which he is also domiciled, or, failing that, a national of that country of which he last became a national.

PART IV—EVIDENCE

10. In any matrimonial proceedings the certificate in writing of an official attached either to the Embassy of another country or to the office of a duly accredited representative of that country, shall be admissible as evidence of the law of that country, provided that such certificate is duly authenticated by the seal of the Embassy or other accredited office, or by the sworn statement in writing of the official who gave it.

11. In any matrimonial proceedings the fact that a ceremony of marriage has taken place in another country may be proved by the evidence of one of the parties to the marriage, supported by a certificate or other document of marriage issued in the country in which the marriage was celebrated.

GENERAL INDEX

NOTE: (1) *Numbers refer to paragraphs except where otherwise stated.*

(2) *Items which refer to England only or to Scotland only are marked (E) or (S), respectively.*

Access to children, 405-407.

Adherence:

order in respect of children in action of, 418 (S).
willingness to adhere, 160-164(S).

Adultery:

bar to relief, 224-228 (E), 229 (S).
cross-examination as to, 933-935 (E).
defence to charge of desertion, 247-251 (S).
disabilities consequent upon divorce for, 1199-1202 (S).
discharge of order of magistrates' court on ground of, 1013 (E), 1056-1057 (E).
divorce on ground of, 114-119.
judicial separation on ground of, 313-314, 317 (S).
notice to third persons of charge of, 1121-1123 (E).
proof of bigamy as evidence of, 932 (E), 989 (S).
proof of finding of, evidence in subsequent proceedings, 929-931 (E), 989 (S).

Aliment: (S).

after annulment, 543, 557.
after divorce, 540, 542, 544-549, 553-556.
disposal of property to defeat claim for, 558-559.
during marriage, 535-539, 544, 550-552.
extension of Sheriff Court jurisdiction, 977-979.
for children, 560-569, 572-576.
machinery of collection and enforcement, 980-984.
Maintenance Orders (Facilities for Enforcement) Act, 1920, 985-988.
summary procedure for obtaining, 969-976.
wife's earning capacity, 552.

see also Legal rights on divorce.

Maintenance.

Marriage settlement.

Property rights between husband and wife.

Allowance for wife, 627, 630, 635, 654-655, 1044.

Appeals:

from decisions of magistrates' courts, 1126-1139 (E).
on points of law of public interest, 960-968 (E), 990-991 (S).

Artificial insemination:

bar to relief in nullity proceedings, 286-287 (E), 296 (S).
divorce on ground of, 72-73, 90.
judicial separation on ground of, 318.

Attachment of wages, 1095-1107 (E).

Bars to relief, 220-223, 319, 1008-1009 (E), 1032 (E).

see also Adultery.

Collusion.

Condonation.

Conduct conducing.

Connivance.

Bestiality:

divorce on ground of, 210-211.
judicial separation on ground of, 313-315, 317 (S).

Bigamy:

proof of, as evidence of adultery, 932 (E), 989 (S).
proof of finding of, evidence in subsequent proceedings, 929-931 (E), 989 (S).

Binding over, 1065 (E).**Breakdown of marriage: 43-54, 69-71, 327-331.**

divorce based on, 57-71, pages 340-341.

Children:

access to, 405-407.
cruelty to, 72-75, 82-83, 127-128.
custody:
 enforcement of orders for, 425-428.
 extension of court's powers, 393-395 (E), 398-403 (E), 410-411 (E), 417-419 (S).
 placing in care of local authority, 395 (E), 398-403 (E), 411 (E), 417-419 (S).
 supervision after orders for, 396 (E), 398-403 (E), 410 (E), 417-419 (S).
evidence by, 937 (E).
issues as to paternity of, 925-926 (E).
legitimation of, 295 (S), 1171-1186.
maintenance (aliment) for:
 additional classes, 572-576.
 from estate of missing spouse, 526-530 (E), page 342 (E).
 liability of parents, 560-569, 1055 (E).
 liability of third persons, 432-433 (E).
 nature of provision made by High Court, 570-571 (E).
 undergoing further education or training, 577-579 (E).
procedure for dealing with, in matrimonial proceedings, 360-364, 365-391 (E), 394 (E), 398-401 (E), 404 (E), 408-409 (E), 412 (E), 413-417 (S), 419 (S).
removal from jurisdiction, prevention of, 420-424.
restriction on divorce where there are children, 219.
separate representation of, 397 (E), 927-928 (E).
sexual offences against, 72-75, 84-85, 127-128, 1029-1031 (E), 1203 (S).

Collusion, 220-223, 230-235 (E), 236 (S), 319 (E), 1009 (E), 1032 (E).

Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926-1950, 866.

Commissioners in Divorce, Special, 736-742 (E), 755-760 (E).

Committees and Commissions:

Business of Courts Committee, (E), 754.
Committee of Inquiry into the Law of Succession in Scotland (Mackintosh Committee), (S), 545-548, 553.
Committee on the Law of Intestate Succession, (E), 1188.
Committee on the Scottish Lunacy and Mental Deficiency Laws, (S), 293.
Committee on Supreme Court Practice and Procedure (Evershed Committee), (E), 754, 922, 930, 960-963.
Committee on Procedure in Matrimonial Causes, *see* Denning Committee.
Departmental Committee on Grants for the Development of Marriage Guidance (Harris Committee), 335-336, 343, 346.
Departmental Committee on the Imprisonment by Courts of Summary Jurisdiction in default of Payment of Fines and other Sums of Money (Fischer Williams Committee), (E), 1099-1101, 1104-1105.
Departmental Committee on Messengers-at-Arms and Sheriff Officers (Scotland), (S), 983.
Departmental Committee on the Social Services in Courts of Summary Jurisdiction, 1066.

Committees and Commissions—*cont.*

Royal Commission on Capital Punishment, 108, 110–111.

Royal Commission on the Court of Session and the Office of Sheriff Principal, (S), 768.

Royal Commission on the Despatch of Public Business at Common Law, 754 (E).

Royal Commission on Divorce (1850–1853), (E), 15–16, 20.

Royal Commission on Divorce and Matrimonial Causes (1909–1912), *see* Gorell Commission.

Royal Commission on the Law of Marriage (1848), 1165.

Royal Commission on the Law relating to Mental Illness and Mental Deficiency, (E), 189, 193, 279, 293.

Royal Commission on the Taxation of Profits and Income, 718.

Standing Committee on Private International Law, 815–819, 826, 837.

Community of property, 630–634, 650–653, pages 390–393.

Condonation, 220–223, 237–243 (E), 244–246 (S), 319 (E), 1008–1009 (E), 1032 (E).

Conduct conducting, 1008–1009 (E), 1013 (E), 1032 (E), 1056–1057 (E).

Connivance, 220–223, 1008–1009 (E), 1032 (E), 1056–1057 (E).

Consent, divorce by, 59–61, 69–70, pages 340–341.

Constructive desertion, 151–156 (E), 169 (S).

see also Intolerable conduct.

Costs (Expenses):

liability for, as between husband and wife, 438–447 (E), 448–452 (S), 453–460.

liability of third parties, 461–462 (E), 463–464 (S).

County courts, proposal to give matrimonial jurisdiction to, 748–751 (E), 997 (E).

Court welfare officers, 369–370 (E), 374 (E), 377 (E), 383 (E), 385–391 (E), 396 (E), 414 (S), 416–419 (S).

Cruelty:

divorce on ground of, 120–136

ground for proceedings in magistrates' courts, 1000–1001 (E), 1027 (E).

insanity as defence to charge of, 247, 252–256, 319.

judicial separation on ground of, 313–314, 317 (S).

to children, 72–75, 82–83, 127–128.

Custody, *see* Children.

Damages, 429–437.

Declarations of status, 908–912.

Decree nisi:

abolition of, 948–954 (E).

length of interval before making absolute, 947–948 (E), 955–959 (E).

Denning Committee, (E), 217, 233, 239, 242, 332–333, 335, 369, 379, 443, 454, 581, 740–741, 749–750, 807–809, 879, 921–923, 929, 934, 939, 953, 955, 959, 1003, 1060.

Desertion:

divorce on ground of, 137–158 (E), 159–171 (S).

finding of, by magistrates' court, 1064 (E).

insanity as defence to charge of, 247, 252, 257–261.

judicial separation on ground of, 316 (E).

Divorce:

general considerations, 34–42, 69–71.

grounds of, in other countries, pages 375–389.

history of, 15–33.

statistics, pages 354–374.

Domestic proceedings in magistrates' courts, 1066–1072 (E), 1076–1084 (E).

Domicil:

- basis of divorce jurisdiction, 775, 780–784, 791–793, 801, 811, 815.
- basis of nullity jurisdiction, 775, 870, 872, 883–884, 892.
- concept of, 790, 803, 811, 816–818.
- separate, of wife, 776, 781, 783, 790, 796, 804–806, 811, 819–826, 870, 894.

Drug-taking, 127–128, 1028 (E).

Drunkenness, 127–128, 135–136 (S), 1028 (E).

Enforcement of custody orders, 425–428.

Enforcement of maintenance (aliment) orders:

- Court of Session and Sheriff Court, 980–988 (S).

- High Court: (E).

- burden of proof of means to pay, 590.
 - issue of writs of execution, 580, 591–592.
 - recovery of arrears from estate of deceased spouse, 593–594.
 - registration of order in magistrates' court, 581–589.

- magistrates' courts: (E), 1087–1094.

- attachment of wages, 1095–1107.
 - cancellation of debt by imprisonment, 1092, 1108–1109.
 - "domestic proceedings" to include application for, 1081–1082.
 - effect of cohabitation, 1014–1016, 1042–1050, page 343.
 - effect of leaving the United Kingdom, 1051–1053.
 - effect of residence under the same roof, 1014–1016, 1040–1041.
 - Maintenance Orders (Facilities for Enforcement) Act, 1920, 1112–1113.
 - procedure for making application, 1119–1120.
 - recovery of arrears from estate of deceased spouse, 1111.
 - suspended committal orders, 1091, 1110.
 - tracing a missing husband, 1146–1150.

Epilepsy, nullity of marriage on ground of, 273 (E), 282 (E), 289–291 (S).

Evidence:

- admissibility of previous findings, 929–932 (E), 989 (S).
- by children, 937 (E).
- by marriage guidance counsellors, 340, 357–359.
- cross-examination as to adultery, 933–935 (E).
- declarations out of court of non-access, 936 (E).
- in applications for custody in the High Court, 384 (E).
- of conduct of a spouse in maintenance proceedings, 506–511 (E).
- of means in proceedings in magistrates' courts, 1116 (E), 1118 (E).
- proof of foreign law, 913–919.

Expenses, *see* Costs.

Family courts, 743–747 (E), 997 (E).

Foreign and other Commonwealth countries:

- divorce statistics, page 368.
- grounds of divorce in, pages 375–389.
- matrimonial property systems, pages 390–393.
- proof of law of, 913–919.
- recognition of matrimonial jurisdiction of, *see* Matrimonial jurisdiction.

Gorell Commission, (E), 15–16, 19, 22–25, 96, 101, 105, 172, 176, 274, 301–302, 310, 454, 532, 581, 720, 741, 749, 933–934, 995–996, 1020, 1028, 1033–1035, 1056, 1065, 1099, 1122, 1146.

Imprisonment:

divorce on ground of, 72-75, 97-103, 127-128.
for debt, 580 (E), 590 (E), 1090-1092 (E), 1108-1110 (E).

Income tax:

assessment of husband and wife, 717-718.
liability in respect of maintenance payments, 589 (E).

Incompatibility of temperament, divorce on ground of, 72-75, 96.

Insanity:

defence to charge of cruelty, 247, 252-256, 319.
defence to charge of desertion, 247, 252, 257-261.
divorce on ground of, 172-209.
judicial separation on ground of, 316 (E).
nullity of marriage on ground of, 273-281 (E), 289-292 (S).

Intolerable conduct:

defence to charge of desertion, 262-263 (S).
divorce on ground of, 127, 169-171 (S), 246 (S), 261 (S).
see also Constructive desertion.

Jactitation of marriage, 325-326 (E).

Judgment summons, 580-582 (E), 590 (E).

Judicial separation:

bars to relief, 319.
grounds of, 298-300, 313-318.
limitation of the remedy, 304-312.
retention of the remedy, 301-303.

see also Aliment.

Children.

Maintenance.

Matrimonial home and contents.

Statistics.

Legal advice, provision of, 355-356.

Legal aid, extension of, to magistrates' courts, 1151 (E).

Legal rights on divorce, 540-548 (S), 553 (S).

see also Aliment.

Marriage settlement.

Property rights between husband and wife.

Legitimation of children:

by subsequent marriage, 1171-1183.
of void marriages, 1184-1186.
of voidable marriages, 295 (S).

Lesbianism, divorce on ground of, 72-75, 86-87, 127-128.

Local authorities:

children placed in care of, 395 (E), 411 (E), 417-419 (S), 575.
grants by, to conciliation agencies, 335-337, 345-350.

Lord Advocate, 990-991 (S).

Magistrates' courts: (E).

adultery, notice of charge of, to third persons, 1121-1123.
appeals from, 1126-1139.
applications courts, 1085-1086.
bars to relief, 1008-1009, 1032.
binding over, 1065.
children, extension of courts' powers, 408, 410-411, 561, 566, 569, 572-578.
children, procedure for dealing with, in matrimonial proceedings, 408-409, 412.
concurrent jurisdiction with Divorce Division, 1060-1062, 1140-1145.
conditions of hearing, 1066-1072, 1076-1084.
consolidation of substantive law, 1018.
constitution of, 1066-1069, 1072-1075.
cruelty, particulars of, 1124.
desertion, finding of, 1064.
discharge and lapsing of maintenance orders, 1010-1017, 1040-1053, 1056-1058, 1084, 1112-1118.
discharge of separation orders, 1010-1013, 1033-1039, 1084.
divorce jurisdiction, proposal to give, 752.
enforcement of maintenance orders, 1081-1083, 1087-1113, 1119-1120, 1146-1150.
grounds of application for orders, 1000-1001, 1027-1031.
husband, relief available to, 1001, 1004-1006, 1020-1024.
legal aid for proceedings in, 1151.
maintenance orders (*see also* discharge and enforcement), 1002-1006, 1014-1017, 1040-1063, page 343.
matrimonial home and its contents, proposal to give powers over, 630, 636-637, 639-642, 656-661.
matrimonial jurisdiction of, 992-999.
registration of High Court maintenance orders in, 581-589.
re-hearing by, 1125.
revival of orders, 1010, 1114-1118.
separation orders (*see also* discharge), 1002, 1004, 1033-1039.
statistics, collection of, 1152-1153.
time-limit for starting proceedings in, 1025-1026.
tracing a missing husband, 1146-1150.
variation of orders, 1010-1011, 1081-1083, 1112-1118.
variation of maintenance agreements by, 727-728, 730-732.

Maintenance: (E).

agreements, 722-733.
determination of liability and assessment in High Court, 938-941.
disposal of property to defeat claim for, 531-533.
enforcement, *see* Enforcement.
for children, *see* Children.
from estate of deceased former spouse, 522-525.
from estate of missing spouse, 526-530, page 342.
interim orders in proceedings in magistrates' courts, 1059-1063, 1139.
liability for:
 extinguished by re-marriage, 477, 496.
 of husband, 465-470, 472-473, 476-481, 483-489, 491-497, 501-503.
 of third persons, 432-433.
 of wife, 465-466, 469, 471, 474-475, 482, 490, 497-503.
 to support guilty spouse, 478-479, 489, 501-503, 1054.
lump sum payment, 513-516, 524.
nature of provision made by High Court, 512-521.
Orders (Facilities for Enforcement) Act, 1920, 985-988 (S), 1094, 1112-1113.
time for making application in High Court, 481, 506-511.
time for making order (High Court), 480-481, 504-505.
wife's earning capacity, 483, 486-487, 493-495.
 see also Aliment.
 Evidence.
 Magistrates' courts.
 Marriage settlement.

Mancroft's Bill, Lord, 1158, 1168.

Marriage:

breakdown of, divorce based on, 57-71, pages 340-341.
failure, 43-54, 69-71, 327-331.
guidance for (*see also* Reconciliation), 327-331.
law, amendment of, 330.
settlement, variation of, 512 (E), 516 (E), 540 (S), 554 (S).
with divorced wife's sister, divorced husband's brother, 1154-1170, pages 343-344.
with paramour, consequences of, 1199-1202 (S).

Married Women's Property Act, 1882, (E), 596, 599-602, 604, 606, 612, 617, 622-623, 681, 704-705.

Matrimonial home and contents, rights in respect of, 515, 600-619 (E), 623 (S), 627, 629-630, 633-634, 636-642, 650-653, 656-698, pages 342-343.

Matrimonial jurisdiction:

basis of divorce jurisdiction, 772, 775-784, 791-796, 800-811, 814-835, 840-844.
basis of nullity jurisdiction, 775-779, 867-872, 875-877, 879-885, 892-894.
choice of law in divorce proceedings, 773, 776, 785, 790, 808-811, 828-839, 866.
choice of law in nullity proceedings, 773, 776, 873, 877, 879, 886-891, 895-899.
courts which should exercise divorce jurisdiction, 736-760 (E), 761-771 (S).
declarations of status, 908-912.
magistrates' courts, 992-998 (E), 999 (S).
presumption of death and dissolution of marriage, 782, 784, 845-847.
recognition of divorce jurisdiction of other countries, 774-779, 786-790, 797-799, 807-810, 812, 848-865, 908-912.
recognition of nullity jurisdiction of other countries, 774-775, 874-875, 878-879, 900-912.

Matrimonial offence, doctrine of the, 56-58, 65, 69-70, pages 340-341.

Mental deficiency:

divorce on ground of, 72-75, 91-95.
nullity of marriage on ground of, 273-274 (E), 276-279 (E), 289-291 (S), 293 (S).

Murder, divorce on ground of, 72-75, 104-112.

National Insurance Scheme benefits after divorce, 712-716.

Nationality and citizenship, basis of matrimonial jurisdiction, 795, 802, 811, 840-844, 893.

Nullity of marriage:

bar to relief, 286-287 (E), 296 (S).
grounds of, 264-283 (E), 288-294 (S).
restriction on proceedings, 284-285 (E), 291 (S).

see also Aliment.

Children.

Maintenance.

Matrimonial home and contents.

Matrimonial jurisdiction.

Statistics.

Pleadings:

address of petitioner, 942-943 (E).
position of "woman named", 945-946 (E).
prayer for exercise of court's discretion, 944 (E).

Pregnancy, nullity of marriage on ground of, 289-291 (S).

Presumption of advancement, 702-703 (E).

Presumption of death and dissolution of marriage:

jurisdiction of the court, 845–847.

re-appearance of spouse presumed dead, 1193–1198.

Preventive detention, divorce on ground of, 72–75, 97, 101–103.

Private international law, 772–775.

see also Matrimonial jurisdiction.

Probation officers:

appointment as court welfare officers, 388–391 (E), 416 (S).

conciliation work of, 334 (E), 338 (S), 351 (S), 354 (E), 359.

enquiries in respect of children (magistrates' courts), 412 (E).

Procedural law, 920–924.

Prohibited degrees of relationship, marriage within, 1154–1170, pages 343–344.

Property rights between husband and wife:

during marriage: 595–597 (E), 620–623 (S).

assessment for income tax, 717–718.

community of property, 630–634, 650–653, pages 390–393.

disclosure of property and income, 706–711.

disputes over possession of property, 602 (E), 623 (S).

disputes over title to property, 600–601 (E), 623 (S), 705 (E).

presumption of advancement, 702–703 (E).

right of action in tort (delict), 599 (E), 622 (S), 702 (E), 704 (E).

rights in respect of matrimonial home, 515, 603–614 (E), 616–619 (E), 630, 636–637, 639–642, 656–698, pages 342–343.

right to contents of matrimonial home, 515, 615 (E), 636, 639–642, 656–661, 674–675, 680–682, 684–687, 691–698, pages 342–343.

savings from housekeeping allowance, 627, 699–701.

status of the wife, 625–628, 643–649, 692.

wife's allowance, 627, 630, 635, 654–655, 1044.

on divorce or annulment: 598 (E), 624 (S):

benefits under National Insurance Scheme, 712–716.

rights in respect of matrimonial home and its contents, 515, 605 (E), 630, 638, 642, 687–698, pages 342–343.

see also Legal rights on divorce.

Marriage settlement.

Protection order, 1203 (S).

Queen's Bench Division, proposal to give divorce jurisdiction to, 753–754 (E).

Queen's Proctor, functions of, 947–968 (E).

Rape:

judicial separation on ground of, 313–314 (E).

proof of finding of, evidence in subsequent proceedings, 929–931 (E), 989 (S).

Recognition of matrimonial jurisdiction of other countries *see* Matrimonial jurisdiction.

Reconciliation:

conditions for effective reconciliation, 340.

deterrents to, 115, 118, 142–144 (E), 146–150 (E), 168 (S), 231 (E), 233 (E), 237–246, 340.

evidence of marriage guidance counsellors, 340, 357–359.

facilities for conciliation, 332–339, 341, 343–351.

grants to voluntary conciliation agencies, 335–337, 341, 343–349 (E), 350 (S).

legal advice, provision of, 355–356.

publicity for facilities for conciliation, 352–356.

see also Marriage, guidance for.

Residence:

basis of divorce jurisdiction, 782, 784, 794, 802, 808-809, 811, 827-839.
basis of nullity jurisdiction, 868, 871-872, 876, 892.

Restitution of conjugal rights, (E), 316, 320-324:

see also Children.
Maintenance.
Statistics.

Restrictions:

on divorce proceedings, 212-219.
on nullity proceedings, 284-285 (E), 291 (S).
on proceedings for judicial separation, 304-306.

Savings from housekeeping allowance, 627, 699-701.**Separation:**

agreements, 157-158 (E), 719-721 (E), 734-735 (S).
divorce after a period of, 59, 62-64, 67-71, pages 340-341.
orders, *see* Magistrates' courts.

Settlement:

marriage, variation of, 512 (E), 516 (E), 540 (S), 544 (S).
of a spouse's property, 512 (E), 516 (E), 519-520 (E), 570 (E).

Sexual offences:

against children, 72-75, 84-85, 127-128, 1029-1031 (E), 1203 (S).
proof of finding of, evidence in subsequent proceedings, 929-931 (E), 989 (S).

Sheriff Court: (S).

extension of jurisdiction in actions concluding for aliment, 977-979.
machinery of collection and enforcement of aliment, 980-984.
proposal to give divorce jurisdiction to, 761-771.
summary procedure for obtaining aliment, 969-976.

Sodomy:

divorce on ground of, 210-211.
judicial separation on ground of, 313-315, 317 (S).

Special Commissioners in Divorce, *see* Commissioners.**Statistics:**

collection of, in magistrates' courts, 1152-1153 (E).
divorce and other matrimonial proceedings, pages 354-374.

Venereal disease, nullity of marriage on ground of, 289-291 (S).**White's Bill, Mrs., 63, 69, page 340.****Wilful and persistent refusal of sexual intercourse, divorce on ground of, 72-79, 127-128.****Wilful concealment of material facts, nullity of marriage on ground of, 267-272.****Wilful refusal to consummate the marriage, 72-75, 88-89, 283 (E), 294 (S).****Wilful refusal to have a child, divorce on ground of, 72-75, 80-81.****Will, effect of divorce on, 1187-1192.****"Woman named ", position of, 945-946 (E).****Writs of execution, 580 (E), 591-592 (E).**

Printed and published by
HER MAJESTY'S STATIONERY OFFICE

To be purchased from
York House, Kingsway, London w.c.2
423 Oxford Street, London w.1
P.O. Box 569, London s.e.1
13A Castle Street, Edinburgh 2
109 St. Mary Street, Cardiff
39 King Street, Manchester 2
Tower Lane, Bristol 1
2 Edmund Street, Birmingham 3
80 Chichester Street, Belfast
or through any bookseller

Price 11s 6d net

Printed in Great Britain